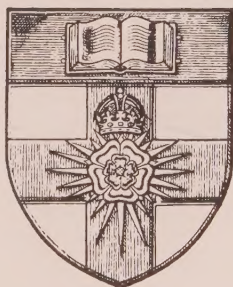


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THE
CRIMINAL APPEAL REPORTS.

WITH
SUBJECT INDEX, TABLES OF CASES AND
STATUTES CITED.

EDITED BY
HERMAN COHEN

OF THE INNER TEMPLE, BARRISTER-AT-LAW

VOL. IX.

LONDON:
STEVENS AND HAYNES,
Law Publishers,
BELL YARD, TEMPLE BAR.

1914.



This Volume should be cited as 9 Cr. App. R.



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ERRATUM.

Page 22, line 17—for “ Act ” read “ Acts.”

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE PICKFORD AND
MR. JUSTICE AVORY.

REGINALD TRELOAR.

1913
5 May.

The Court will not interfere with a conviction based upon the fact that handwriting is traced to the defendant without positive proof that that handwriting is not his.

In such a case the Court does not necessarily call in expert evidence.

This was an appeal against conviction on the certificate of Lush J. who tried the case, and an application for leave to appeal against sentence. Appellant was convicted, on the 10th April, 1913, at the Central Criminal Court, of sending a letter demanding money with menaces, and was sentenced by Lush J. to three years' penal servitude.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with his brother, George Treloar, for sending on the 11th March, 1913, a letter to Mr. Cyril Maude, demanding money of him with menaces and without any reasonable or probable cause; the second count of the indictment charged him with sending the same letter threatening to kill and murder him. George Treloar was acquitted. There was a second indictment on the file with reference to a letter sent on the 15th March. The facts were that on the 11th March Mr. Maude received a letter at the Playhouse, as follows:—

30, College St.,
Belvedere Rd., London, S.E.

Kindly sent at once £5 or I will expose you and make your life a hell as you made mine once. If I don't get £5 to-night look out

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Ridley J.
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Avory J.

when you leave the theatre. I will do you in. Send money to me or c/o my brother, 8, Rochester Row, S.W. (Mr. Treloar). Be wise.

REGGIE TRELOAR.

This letter was written in printing capitals.

Mr. Maude communicated with the police, and on their advice sent a letter on the 14th March to the appellant, inviting him to come to the theatre on the following day. On the following afternoon, before the time fixed for the visit, Mr. Maude received the second letter, which was in similar terms, but was in ordinary handwriting. George Treloar came to the theatre at the appointed time with Mr. Maude's letter in his hand; he was met by Detective-Serjeant Boothy, who said, "Is your name Reggie Treloar?" and "Do you live at 30, College Street?" George answered "Yes" to both questions and was then arrested. He then at once commenced an attack on the appellant's character; he said, "I know nothing about the letters. I believe my brother knows something about them. He sent me here." He told the detective that the appellant was waiting in a neighbouring public-house, and he was found and arrested there. The appellant on arrest said: "I know nothing about any letters. I thought there would be some trouble about this. I got two months on account of Mr. Cyril Maude for sending him some begging letters, but I have gone straight ever since. I shewed my sister the letter I received from him, and she advised me to go and see Mr. Cyril Maude and get the matter cleared up." This statement was absolutely consistent with the defence raised, and the police evidence shewed that he did consult his sister, who was a woman of excellent character.

A memorandum book was found on the appellant which was admittedly in his writing; Boothy used this in the police court and gave evidence as to similarities of handwriting in it and the letters. At the trial the whole case against the appellant was that he was the writer of the letters; the jury examined the exhibits for some time and clearly thought that the writing was the same. The summing up also was practically entirely devoted to this view. The question whether the appellant merely had a guilty knowledge of the letters was never before the jury.

On the morning after the trial Lush J. received a letter in the following terms: "You gave Reginald Treloar three years. It

was me who wrote the letters to Cyril Maude through spite. Compare with original." That was in printing capitals, and then followed "The Playhouse, Northumberland," in written letters and "Reggie Treloar" written once in each way. I also received a letter in the same terms and containing words written in printing and writing characters. I submit that it is clear that both these letters are in the same writing as those to Mr. Maude; the similarities are remarkable in the printed words, and still more so in the written ones. It is not likely that, if George Treloar wrote the letters to Mr. Maude, the appellant knew it, as George would hardly have dared attack the appellant as he did all through the case if he had known that the appellant was aware that George was the actual writer. If they were written by a third person the case that this was done on behalf of the appellant was never before the jury.

It is true that the appellant had been convicted of sending begging letters to Mr. Maude two years ago, and the evidence of this, although unavoidable, created an unfortunate prejudice against him. The appellant was convicted as the writer of the letters in the present case, and the developments since the trial shew almost conclusively that he did not write them.

Comyns Carr for the Crown was not called upon.

AVORY J.: The appellant in this case was convicted on an indictment charging him with sending a letter to Mr. Cyril Maude demanding money with menaces and without reasonable cause. The letter as to which he was convicted was in printing characters, on which it would be unsafe to identify anyone as the writer. It is true that the trial proceeded on the footing that the letter was in the appellant's writing, and also a letter received four days later by Mr. Cyril Maude which was in ordinary handwriting and not printed. Here again in the opinion of the Court it would be unsafe for any jury to act on the evidence of the writing alone. It may be the writing of a partly educated man, or it may be written to simulate such writing, but the evidence on which the jury were invited to infer that the second letter was in the handwriting of the appellant was a memorandum book found upon him in which the writing was said to resemble that in the letter. Now it would have been obviously unsafe for any jury to act on that

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evidence alone, and the Court is satisfied that they did not act on that evidence alone. There was evidence here which necessarily came out that the appellant had been convicted a short time ago of an attempt to obtain money from Mr. Cyril Maude by false pretences. The appellant admitted that the letters in that case were written by him, and as they were written in various names and in various forms of handwriting they shewed that he was able to write in various styles. There was evidence that the appellant's brother, George, arrived at the theatre and gave the name of Reggie Treloar, and said that he had come in answer to Mr. Maude's letter. At the trial both George and Reggie Treloar gave evidence; George gave evidence that he believed the documents were in his brother's handwriting; that he was in work and that his brother was not, save for some casual employment. In the result the jury acquitted George and convicted the appellant, and Mr. Purchase very frankly and properly told us that he had no complaint to make with regard to the trial or to the summing up, and the sole ground on which leave to appeal was granted and the case argued is that a day or so after the conviction two letters were received, one by Lush J., and one by Mr. Purchase, that to Lush J. being printed but with some writing, and that to Mr. Purchase being written but with some words printed, and both letters being obviously intended to convince the recipients that the writer of both the letters on which the appellant was convicted is still at large. It is necessary therefore to consider whether, even if this is so, the fact that the writer is still at large is so inconsistent with the guilt of the appellant that the Court could not allow the conviction to stand.

In the first place the Court is not satisfied that the person who wrote the letters to Lush J. and Mr. Purchase also wrote the documents in respect of which the appellant was indicted. It is impossible for anyone to form a definite opinion on such material. There are undoubtedly similarities, but it is seldom one would find two writings without similarities. It is equally clear that there are many dissimilarities. Apart from that point there is, and was, cogent evidence to suggest that the appellant and his brother were both parties to the transaction, and on that evidence the jury might well have convicted George Treloar. Mr. Purchase argues to-day that on the evidence it is equally likely that George Treloar wrote both the letters for which he and the

appellant were indicted; if that is so, he is still at large, and there is no difficulty in explaining these letters. Without deciding that point it is sufficient to say that the letters may have been written by some person anxious to mislead the Court and therefore imitating the handwriting of the appellant; that would be easy if any samples of his handwriting are at 30, College Street. The Court is unable to say that there are any grounds for interfering with the conviction.

As to the sentence, it is unnecessary to point out the extreme gravity of the offence, and this case is aggravated by the fact that the appellant had previously attempted to obtain money by false pretences from the same gentleman. The sentence is not excessive.

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TRELOAR.

AVORY J.

Appeal dismissed.

A. L. B. T.

RICHARD HENRY HOOPER AND WILLIAM DONALD HARDY.

Severity of sentence.

These were appeals against sentence and applications for leave to appeal against conviction as a habitual criminal in each case. Appellants were convicted of larceny and of being habitual criminals, on the 14th April, 1913, at the Deal Quarter Sessions; Hooper was sentenced to four years' penal servitude and five years' preventive detention, and Hardy to five years' penal servitude and five years' preventive detention.

Appellant Hooper in person. My age is only twenty-eight; there is time for me to reform and I will do so. I had done honest work as a barman and at the seaside since my last release from prison.

Appellant Hardy in person. My age is twenty-nine. I have tried to get work after each of my last four discharges from prison, but have a weak constitution, which is against me. I worked as a barman after my last release from prison.

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HOOPER
AND
WILLIAM
DONALD
HARDY.

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Pickford J.
Avory J.

Weigall for the Crown. The appellants worked as barmen for a month or so, and then left that employment to take part in a series of crimes, which were all of the same character. Scotland Yard sent a list of twenty-seven crimes committed in thirteen months and the appellants admitted being guilty of ten of them. The question of Hooper's age was before the jury.

RIDLEY J.: In this case both appellants appeal against their convictions as habitual criminals, but it seems to us on the facts that without question the verdicts were right. It is impossible, in face of the fact that they admitted being concerned in ten offences in 1911 and 1912, to say that they were not leading persistently dishonest or criminal lives. The only point is in regard to the age of the two men, Hooper is twenty-eight and Hardy twenty-nine; there is no law which prevents a person from being convicted as a habitual criminal before he is thirty, but it is a matter on which we ought to be careful. Hooper's age was certainly mentioned to the jury, and probably Hardy's also, and the Court sees no reason to interfere with the convictions, but it thinks the period of penal servitude might be reduced in each case. We agree with the Recorder that it is desirable that they should have different terms, but it will be sufficient if Hooper has three and Hardy four years' penal servitude; the sentences of preventive detention must stand, but the Home Secretary can deal with the question if he thinks it desirable.

Appeals against convictions dismissed—Sentences reduced.

A. L. B. T.

BEFORE

MR. JUSTICE PICKFORD, MR. JUSTICE BANKES, AND
MR. JUSTICE AVORY.

GEORGE METCALFE.

1913
6 May.

Where there is some evidence to go to the jury, the Court will, if necessary, look at the depositions.

If previous convictions are not strictly proved, the Court may reduce the sentence.

This was an appeal against conviction and sentence by leave of Lord Coleridge J. Appellant was convicted of larceny, on the 15th April, 1913, at the Pontefract Borough Sessions, and was sentenced to three years' penal servitude.

L. P. Clay for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The evidence called at the trial for the prosecution was that on the 6th March, 1913, a man named Wadsworth was sitting at his window and heard a voice say, "Are you in?" at the next house. Knowing that his neighbour, whose name was Holgate, and Mrs. Holgate were both out, he went out, and looking through a glass panel in the Holgates' door saw a man walking about inside. After some minutes the appellant came out, and Wadsworth accused him of having stolen something from the house. Mrs. Holgate arrived and, after searching the house, said that a muffler was missing. By that time the appellant had left, and the police were informed. He was arrested shortly afterwards and taken to the Holgates' house, where, according to the police sergeant, he asked Mrs. Holgate if she had lost a muffler, and on her saying that she had, offered to give her his own. The following morning a witness named Burke found the muffler behind a house in which he was lodging and where appellant had been lodging. Burke was unable to say on what date appellant had been lodging there. Neither Holgate nor Mrs.

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6 May.

GEORGE
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Avory J.

Holgate were called at the trial, nor were their depositions put in. The appellant's story was that he went no further than the door, and it was proved that another man was there.

My first ground of appeal is that there was no evidence of any larceny, and my second that there was no identification of the property; there was no evidence when the muffler had been in the Holgates' house; Wadsworth had said he had seen Holgate wearing it, but he did not say when. There was no evidence that it had ever been in the appellant's possession; the evidence given by Wadsworth that Mrs. Holgate said a muffler was missing was pure hearsay, and ought not to have been admitted.

Lastly, the Recorder misdirected the jury by telling them that there was no doubt the muffler was taken out of the house, as to which there was no evidence; he also told them the muffler was found near by where the appellant was lodging that day, but the witness Burke could not say that he had been at the lodging on that day.

The sentence was excessive. Though the appellant is said to have been previously convicted, no previous convictions were put to him at the trial, and if he was charged in the indictment with having been previously convicted he was never asked to plead to it.

Comyns Carr for the Crown (who was called on as to sentence only). The Recorder said to the appellant, "You have a long list against you," and the appellant said, "Yes, sir."

PICKFORD J.: In this case difficulties have arisen from the fact that the solicitor who appeared for the prosecution, Pontefract being a place where solicitors have a right of audience at Quarter Sessions, did not take any steps to put in the deposition of Mrs. Holgate, who was an important witness in the case, and the wife of the owner of the property. This witness was ill and not able to attend. Why he did not the Court does not know, but the non-appearance of that witness leaves the evidence of theft very slight. The Court cannot say that there was no evidence; there was evidence that the muffler had been seen by Wadsworth in the house, and also that it had been worn by Holgate, to whom it was said to belong. Further, there was evidence that when Mrs. Holgate complained of the theft the appellant did not deny

it, but said, "Here is mine in exchange." Wadsworth was not questioned as to the time when he had seen the muffler. It seems to the Court, therefore, that there was some evidence of the theft, but not much, and to see if there has been a real miscarriage of justice the Court has looked at the depositions, which shew that there has been none. That would not be enough if there had been no evidence against the appellant at the trial, but if there is some, as here, the Court will be justified in upholding the conviction.

As to sentence there seems to have been considerable irregularity in the way in which the appellant was treated with regard to his previous convictions; a previous conviction was charged in the indictment, but he was never arraigned on this charge. He was told by the Recorder that there was a list of convictions against him, and he admitted the fact, but although he twice tried to make some explanation he was stopped. The Court thinks that in the circumstances a sentence of three years' penal servitude ought not to be given, and reduces it to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

ERNEST OURTIS.

It is misdirection, for which a conviction will be quashed, to assume wrongly the admission of a previous conviction, and to declare that an alibi is unsatisfactory, when that is not in fact proved.

The Court of trial has a discretion as to putting the prosecution to election when there is a multiplicity of counts from which there is no appeal.

This was an appeal against conviction and sentence by leave of Lord Coleridge J. Appellant was convicted on an indictment containing three counts for indecent assaults, on the 3rd April, 1913, at the Bath City Sessions, and was sentenced to nine months' imprisonment with hard labour.

C. T. Carr for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There were originally three indictments against the appellant charging him with three indecent assaults on different girls, at different places, and on different dates,

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namely, 15th January, 16th January, and 4th February, 1913; but the Deputy Recorder directed that one indictment, alleging the three assaults in different counts, should be sent up to the Grand Jury, and the appellant was tried on this indictment in spite of the fact that I took objection to the course as embarrassing, especially as there were different defences to the different cases. It may be that the matter is one for the discretion of the judge at the trial, but the appellant was prejudiced by this decision, and it rendered it all the more necessary that the trial should be conducted with the greatest strictness. There was no strong corroboration in any of the cases; in one case, where the defence was that it was a misunderstanding by the girl, and that the touching by the appellant was an innocent one done to save her from falling out of a cart, the only corroboration was that the girl was crying, in the other cases the defence was an *alibi*, and the evidence of identification was not strong. This was a further reason why the cases should have been carefully watched, and the jury should have been told that three weak cases are not equal to one strong one, and that three imperfectly corroborated charges do not corroborate one another.

The appellant had on a previous occasion been bound over for stealing a bicycle, and on arrest he said, "Oh, my God, whatever shall I do? my trouble will never end," and later, "Whatever shall I do? My troubles will never end. I only get over one lot of trouble and get into a nice place, and this crops up." Although these were references to his previous conviction, the jury did not know it. In the opening of the prosecution it was suggested that prisoner had been "disturbing the female population of Bath for some time." Therefore I was anxious to shew that these remarks by him on arrest did not refer to any sexual offence, and the police sergeant admitted that in cross-examination. Even if that question entitled the prosecution to cross-examine as to the conviction, which I submit is not the case, they did not do so, nevertheless the Deputy Recorder, in his summing up, mentioned that the appellant had been convicted before. He referred to the fact that a prisoner can now give evidence, and is entitled to the credibility of an ordinary witness, and has a right to have his evidence accepted, and then he added, "But if it should happen in cross-examination that he was asked, 'Were you convicted only a short time ago of felony?' well, I

am not going to put the case too high that a great deal of the credence to which that man would be entitled is gone. In this particular case it is admitted that a short time ago he was convicted." I protested, and counsel for the prosecution said, "My recollection is that it was said there was an offence or trouble that had nothing to do with this case," and the Deputy Recorder said, "As far as it goes, there is an admission that he had been in trouble before;" until then the word "trouble" might have meant anything. He went on to say that a good deal of the appellant's credibility had gone, and that it was his duty to tell the jury the value of evidence which they had to "balance;" this puts the onus on the wrong shoulders.

In dealing with the evidence of an *alibi* the Deputy Recorder said there was a discrepancy between the appellant's evidence at the police court and that at the trial, but this was not the case; his evidence was quite consistent, but when first charged he could not remember exactly what he was doing on the particular day; he afterwards remembered that he was with his sweetheart at the time.

The verdict was a general one, simply "guilty."

Comyns Carr for the Crown. I cannot say that the reference in the summing up to the previous conviction was altogether correct, but no harm can have been done, as enough had been said in evidence to put the jury on suspicion. In any case, there was no miscarriage of justice; if the appellant had been tried on the most serious case as to the girl Jay, the evidence of the other girls would have been admissible, because the defence was that he did the act innocently. Evidence of other similar cases can be given to negative an innocent interpretation. *Ball*, (1911) A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Crim. App. R. 31.

[AVORY J.: I do not think *Ball* is authority for that proposition.]

See also *Makins v. Attorney-General for New South Wales*, (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148.

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There was evidence that he offered Jay a penny, which he denied; and he was identified in the other cases by the complainants, who were girls of fourteen and sixteen years, though the companion of one of them picked out the wrong man. Even if the *alibi* set up at the trial was not inconsistent with his evidence at the police court, it was new; he said he had been to a picture palace, but he could not remember what pictures he had seen. The facts sworn to may have related to some other Thursday in January.

BANKES J.: In this case the appellant appeals against his conviction on two grounds, firstly, that the Deputy Recorder was wrong in allowing him to be tried on an indictment containing three counts, each alleging a separate indecent assault, and in not putting the prosecution to their election, and secondly, that the Deputy misdirected the jury. The indictment charged the appellant with indecent assaults on three different girls, on the 15th January on Reeves, on the 16th January on Leverton, and on the 4th February on Jay. So far as the objection to allowing the prosecution to proceed on the indictment with the three counts goes there is no reason to interfere. It is a matter for the discretion of the judge, and it is not a matter of appeal even if that discretion is wrongly exercised.

The other point taken is a more serious one, because on the evidence it appears that in each case it was really a case of oath against oath, the girls' on the one hand and the man's on the other, who, as to two of the cases, set up a strenuous *alibi*. In the first place, as to Jay's case, the question in dispute was what the appellant actually did. It was not disputed that she was in the baker's cart with the appellant, or that he put his hand on her knee; according to the girl it was an act of a very indelicate nature, and if the girl was believed, it certainly amounted to an indecent assault. That was the question in dispute, the nature of the act. It appeared that when arrested the appellant blurted out a statement referring to a previous trouble which was not defined. The Deputy, instead of taking special care to protect him from any prejudice which might be aroused in the minds of the jury from this unguarded statement, took it as though it were a deliberate answer in cross-examination, and an admission of having committed some criminal act, probably a felony. On

that assumption he invited the jury to discredit the appellant's evidence, and told them that they might properly and usefully take into consideration the fact that he admitted having been previously convicted. The Court thinks that this was a serious misdirection, and that it is impossible to say it did not result in a miscarriage of justice. So the conviction on the count relating to Jay cannot stand.

There remain the convictions on the two other counts. To these the objection already dealt with also applies, but a further objection is also taken. It is said that the Deputy Recorder misapprehended the effect of the evidence, and assumed that there was a discrepancy between the evidence given by the appellant at the police court and that given at the trial, and that he consequently directed the jury that the *alibi* might be discredited. There was a direct conflict of evidence; the girls spoke to some acts of a man as occurring at certain times, and the appellant said he was never there at those times, but elsewhere, and he called a servant, with whom he was keeping company, and her mistress. The mistress established beyond all doubt that the servant entered her service on the 20th January, and there was never any difference between the stories of the appellant and of the servant, but the judge said, "That evidence claiming an *alibi* is not satisfactory, because it is different to the evidence put forward by the prisoner when before the magistrates." It is established to our satisfaction that there was no discrepancy, and that the Deputy Recorder was under a misapprehension when he directed the jury that the evidence as to an *alibi* was not satisfactory. This was a serious misdirection. The convictions on these counts also must therefore be set aside.

Conviction quashed.

A. L. B. T.

CHARLES EDGAR.

A recognisance to be of good behaviour should bind for a definite period.

This was an appeal by leave of Bray J. against that part of the sentence which ordered the appellant to enter into a recognisance. Appellant was convicted of libel, on the 1st April, 1913, at the Central Criminal Court, before the Recorder, and was

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sentenced to six months' imprisonment, and ordered to enter into a recognisance to keep the peace and be of good behaviour, or in default to be imprisoned for a further six months.

B. Honour for the appellant, who was present. The appellant was bound over in the sum of 50*l.* for an indefinite period; there is no statutory authority for binding a prisoner over for libel, but *Hart*, 30 St. Tr. 1131 (1808), is authority that the Court can require sureties for a reasonable time. That was followed in *Dunn*, 12 Q. B. 1026; 18 L. J. M. C. 41 (1847). It has never been suggested that the Court has power to bind a man over for an indefinite time; the rest of a man's life cannot be a reasonable time, for that would amount to imposing perpetual bail, which is prohibited by the Bill of Rights (1688). The text-books all state that a prisoner may be bound over for a reasonable time to be specified in the order. See Archbold's Criminal Pleading, 24th ed. p. 257.

Ivan Snell for the Crown. I know of no case where a prisoner has been bound over for an indefinite time. Two letters have been written by the appellant since his conviction to the Registrar of this Court, which repeat his offence.

PICKFORD J.: Objection is taken in this case to the fact that the defendant has been ordered to enter into a recognisance for an indefinite period. It is not necessary to decide whether there is power to order a recognisance to be entered into for life; we do not decide that there is no such power. It seems, however, that in all cases it has been the practice to limit the time for the recognisance, and in no case has an indefinite time been inserted in the order. The Court thinks it is better, whether there is power to leave the time indefinite or not, that the usual practice should be followed, and a time inserted. In this case it must be a considerable time considering what has happened, and we fix it at five years, for which time the appellant is to keep the peace and be of good behaviour to all His Majesty's subjects, especially the prosecutor, and in default to go to prison for six months.

Sentence varied.

Solicitors for the Appellant—*Coote & Richards.*

A. L. B. T.

FRANK PRICE.

*Primâ facie the conversion of a bailed chattel by sale is fraudulent ;
the onus of proving the transaction a loan is on the bailee.*

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This was an appeal against conviction for horse stealing on grounds involving a point of law, and an application for leave to appeal against sentences, this question having been referred to the Court by Bray J. Appellant was convicted of larceny and horse stealing, on the 7th April, 1913, at the Buckinghamshire Quarter Sessions, and was sentenced to four months' imprisonment with hard labour on each charge, the sentences to run concurrently.

C. K. Tatham for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was charged on three indictments, in the first of which he was charged with stealing potatoes on the 16th February, 1913; he was not defended on this charge, and was convicted. On the second indictment, which charged him with stealing a pony on the 21st October, 1912, I defended him under the Poor Prisoners' Defence Act, and he was also convicted. The third, which charged him with stealing the same pony in March, 1913, was not proceeded with. The appellant, who is a hawker, bought the pony from his cousin, another hawker, in the spring of 1912 for 5*l.* 10*s.* On the 14th September he sold it back to his cousin for 4*l.* 10*s.*, but hired it from him for a weekly sum of 4*s.*, which was paid until the middle of February, 1913. On the 21st October the appellant sold the pony to a man named Lee for 3*l.*, but it was agreed that he should retain the pony in his possession, paying Lee 3*s.* weekly for the hire, and be at liberty to re-purchase the pony at any time for 3*l.* An agreement to this effect was executed; it was this transaction which formed the subject of the second indictment, the prosecution alleging that it amounted to larceny as a bailee; the appellant alleged that it was only a loan for which the pony was security. In March, 1913, the appellant sold the pony to one Greaves, and this transaction formed the subject of the third indictment, which was not proceeded with. I admit that, on the face of the document, the dealings in October amounted to a sale, and that an out-and-out sale would be conversion even without delivery. I submitted that the facts shewed that this transaction

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was not a sale, but a loan, and this was the question that was left to the jury.

At the trial I objected to the admission of Greaves's evidence as being quite irrelevant; the Chairman held it admissible as proving the identity of the pony, but this was never in question; he also purported to let in the evidence as being in favour of the appellant, although I, as his counsel, objected. The prosecutor admitted in cross-examination that if the appellant had paid him a fair value for the pony he would not have objected to the sale. The Chairman in his summing up never told the jury that Greaves's evidence was not substantive evidence of the stealing, although I submitted that it was a question on which the jury ought to be warned. The grounds on which evidence is admissible is laid down in *Bond*, (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; and Greaves's evidence does not come within any ground mentioned there; Kennedy J., in his judgment, said that single instances cannot be evidence of intention to prove system or design, and Bray J. agreed.

[BANKES J.: I do not think *Bond* is an authority for that proposition; it must depend on the circumstances of the particular case.]

The identity of the pony was not disputed, and was therefore not an issue in the case.

[PICKFORD J.: It was necessary to prove the identity: there can be no admissions in a criminal case.]

As Greaves's evidence was the subject of another indictment, it ought to have been excluded on this trial. *Westwood*, 4 C. & P. 547 (1831).

Secondly, the evidence did not shew that there had been any conversion; a man may pledge property which has been bailed to him, and it is a question for the jury whether he had an intention of redeeming the property bailed. Here, as the appellant retained the possession of the property, the facts are much more in his favour. *Jackson*, 9 Cox C. C. 505 (1864) is in my favour, and so is *Weekes*, 10 Cox C. C. 224 (1866). It is true that *Jackson* is criticised in *Wakeman*, 8 Cr. App. R. 18 (1912), but it

has never been overruled. Although delivery is not necessary for conversion, the only case where it was held to be conversion, although there had been no delivery, is *Wakeman*, where there was a refusal to return the property. Conversion sufficient for the purposes of a civil action may not be enough to support a conviction, and even if what was done amounted to a conversion, it was not a fraudulent conversion.

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Comyns Carr for the Crown was called on only on the question whether Greaves's evidence was admissible. Greaves's evidence was admissible as tracing the identity of the horse, and also on the question whether the appellant's dealings with Lee were fraudulent or not. Where a bailed article is pledged it is held to be conversion, unless substantial evidence is produced that when the prisoner pledged it he intended, and had the means of, redeeming it. *Wynn*, 16 Cox C. C. 231; 56 L. T. 749; 52 J. P. 55 (1887).

AVORY J.: In this case two points were originally taken, but in the course of the argument they have really developed into three. The first point is that evidence of the appellant's transaction with Greaves was improperly admitted. The appellant was charged with the larceny of a pony as a bailee, and the alleged conversion consisted in a sale of the pony by the appellant to Lee in October, 1912. This sale was evidenced by a document which undoubtedly on its face amounts to a sale with the right of repurchase. *Primâ facie* that constitutes conversion, but it appears that under the same agreement the appellant retained the right of keeping the pony on hire, and while the pony was so in his possession he sold it to Greaves in March, 1913. Objection was taken at the trial that the evidence of Greaves was not relevant, and the Chairman, after some discussion, admitted the evidence as part of the history of the pony and of the case, and he reports to us that he also thought the evidence admissible because it was, if anything, in favour of the appellant's view that the transaction with Lee amounted to a mere pledge. It is sufficient for the purposes of our judgment to say that the evidence was relevant on the question of the identity of the pony: there is a good deal to support the view that it was admissible also on the issue whether the appellant's conduct was fraudulent or not, but it is not necessary to base our judgment on that ground.

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The second point taken is that there was not sufficient evidence to shew conversion. Counsel for the appellant admitted that a sale even without delivery would be sufficient; the jury in this case had the question left to them whether the transaction was a sale or a loan, and they obviously took the view that it was a sale quite apart from the words of the document. In the circumstances we think there was ample evidence to support the view that it was a conversion. The third point is that the question whether it was a fraudulent conversion was not properly left to the jury. We are told, and we do not doubt, that counsel urged that view upon the jury, and even if he had not done so, the jury would know that a man cannot be convicted for a mere mistake as to his legal rights. We think that the Chairman intended them to exercise their judgment on this point by directing them to acquit the appellant if they found the transaction only amounted to a loan. The jury must be taken to have found that it was a fraudulent conversion, and the appeal against conviction therefore must be dismissed.

The sentence was one of four months' imprisonment with hard labour on each indictment, to run concurrently. The Court cannot say that this was excessive for either or both offences.

Appeal dismissed.

A. L. B. T.

WILLIAM TRENHOLM.

Severity of sentence.

This was an appeal against sentence by leave of Lord Coleridge J. Appellant was convicted of burglary, on the 3rd April, 1913, at the Sunderland Borough Sessions, and was sentenced to five years' penal servitude.

St. John Hutchinson for the appellant, who was not present. This was the first conviction on indictment against the appellant, and there were only four summary convictions for drunkenness and brawling against him. After verdict a police-inspector gave evidence, and said that he had known the appellant for five or six

years, he never did any honest work, travelled in trains, attending race meetings, card-sharpping, and was the associate of a most dangerous gang of thieves. The appellant denied that he was an associate of thieves. He had been tried for safe breaking, but acquitted. The Recorder, in sentencing him, said: "It is clear that although you may have escaped punishment you are an expert burglar. How far you are connected with the man May, who will come before the Court presently, I do not know, but there is no doubt about it you are an expert burglar, and this was a burglary carried out by an expert burglar, and you are a danger to the whole community. Inspector Marshall has told me exactly the kind of man you are, and the public must be protected from men of your description." In the burglary for which he was convicted there was obviously another man concerned, who seems to have been the leading spirit.

H. S. Mundahl for the Crown. This was a case where a public-house had been broken into, and a safe forced. The way in which it was carried out pointed to considerable skill. In the case for which May was indicted, to which the Recorder referred, another public-house was broken into in exactly similar circumstances.

AVORY J.: In this case the Court thinks that the Recorder gave too much effect to the general bad character given to the appellant by the inspector. It was a single offence of burglary, which, though serious, was his first conviction. His age is only thirty; we think the sentence excessive, and reduce it to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

Solicitors for the Appellant—*Lewis, Margetts & Jenkins.*

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BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY; AND
MR. JUSTICE ROWLATT.

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CLEMENT ROBERT TRUEMAN.

Though the Court is satisfied with a conviction it may grant leave to appeal against sentence if any point of law arises in relation thereto. Dinnick (3 Cr. Ap. R. 77; 1909) explained.

This was an application for leave to appeal against conviction and sentence, and to call further evidence. Appellant was convicted of publishing a defamatory libel, at the Cardiff Assizes, on the 18th March, 1913, before Avory J., and was sentenced to twelve months' imprisonment, and ordered to pay the costs of the prosecution, and to enter into a recognisance for twelve months, and to find one surety for £50, or in default to be imprisoned for a further twelve months.

Gerald Dodson for the appellant, who was not present. This application came before the Court on the 28th April on a notice of appeal drafted by the appellant, and it was postponed in order that I might put the grounds of appeal into proper shape; this has now been done. The libels which the appellant was convicted of publishing, after a trial which lasted six days, were on a Mr. Trick, a Justice of the Peace for the Borough of Neath. A plea of justification was filed, which contained a large number of charges against Trick. These charged Trick with being a systematic swindler, and were similar in nature, with the exception of two, and it is with the remaining two that I wish to deal. These charged him with having conspired with Brinley Richards and Howell Jenkins to carry on a money-lending business; it was alleged that an agreement was entered into between them,

dated the 27th November, 1909, and an account opened by them at the Metropolitan Bank, Neath; that the business was registered on the 31st January, 1910, in the name of Howell Jenkins, the names of the other two partners being suppressed, and that about the 6th December, 1909, Trick introduced Luther Jones to Howell Jenkins as a person lending money on his own account, and induced Luther Jones to execute a bill of sale in favour of Howell Jenkins, under which the property included in the bill of sale were subsequently sold by Trick. Further, that about the 17th January, 1910, the firm lent to Alfred Vizard £25, taking as security a bill of sale, which was not registered. Both these transactions took place before the money-lending business was registered, which was an offence under s. 4 of the Money-lenders Act, 1910. Although these allegations were proved in evidence, the judge omitted to make any reference to them in his summing up. If the jury held that these allegations were proved they might have decided that the justification was established, and that Trick was a "schemer and trickster" as alleged, even if not a systematic swindler. I do not suggest that in either of these cases the borrowers were over-reached by Trick. It was laid down in *Dinnick*, 74 J. P. 32; 3 Cr. App. R. 77; 26 T. L. R. 74 (1909), that the defence in a criminal trial must be fully and fairly put to the jury, even if it is a weak one. Here Avory J. dealt with one or two of the cases mentioned in the plea of justification, but said that he did not intend to go through every one of them; this was not putting the defence fully before the jury; in any event, these were the two strongest cases, and should have been referred to in preference to any of the others.

In what was known as Jenkins's case, Trick had been consulted by Jenkins when he found himself in financial difficulties, and prepared a statement of his accounts; this contained an item of £16 17s. 6d., as rent due to Trick, and Trick admitted that £10 of this was not for rent, but was money lent to Jenkins; if so, it was a preferential payment to himself. Moreover, the account contained an item of £10 due to one Morgan, whereas Jenkins said he never owed money to any man of that name. Although twelve creditors expressed their willingness to accept the composition suggested by Trick, and although Trick had £120 of Jenkins's money, no sum was paid to any of these creditors. None of these points was referred to in the summing up.

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Although counsel for the prosecution submitted that no *primâ facie* case of justification had been made out, the judge refused to stop the case. No evidence was called to prove the falsity of the libel, and the judge should have told the jury that it was the duty of the prosecution in the circumstances to prove its falsity.

As to the evidence which the appellant wishes to call I must admit that the witnesses could have been called at the trial.

The appellant was convicted under s. 5 of the Libel Act, 1843, and received the maximum sentence of twelve months' imprisonment, but he was also ordered to enter into his own recognisance with one surety to keep the peace and be of good behaviour to all His Majesty's subjects, especially to Trick, or in default to be imprisoned for a further twelve months. I submit that there is no power to impose this further period of imprisonment. The power to impose imprisonment in default of finding sureties is given in the case of felonies, except murder, by the Criminal Law Consolidation Act of 1861, but there is no such power in the case of misdemeanour. This is the view expressed in Archbold's Criminal Pleading, Evidence and Practice, 24th ed., p. 257, but in the Laws of England, vol. ix., Criminal Law and Procedure, p. 412, s. 790, a contrary view is expressed, and *Dunn*, 12 Q. B. 1026; 18 L. J. M. C. 41 (1847), is quoted in support of that view. In *Dunn* the sentence passed by Lord Denman C. J., contained no reference to imprisonment in default of finding sureties, but in the writ of error in the Exchequer Chamber it was stated that the judgment was that the defendant be imprisoned until the required security was given. Parke B., giving the judgment of the Court to the effect that the defendant could be ordered to find security, and be imprisoned until such security was found, based the decision on *Hart*, 30 How. St. Tr. 1131 (1808). In *Hart* the question was referred to the judges whether sureties for a reasonable time for good behaviour could be legally required, and the judges gave an unanimous answer in the affirmative; there was no reference to imprisonment in default. It is submitted, therefore, that the view expressed in Archbold is correct, and not that expressed in the Laws of England. If a prisoner refuses to find sureties his sentence of imprisonment can be increased so long as it is not made to exceed the maximum term for the offence in question. Apart from this, the sentence was too severe, as no effect was given to the jury's recommendation to mercy; the jury must

have thought there was good reason for such a recommendation, as it was given in spite of the fact that the appellant had twice insulted them.

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Ivor Bowen, K.C. (with him *Trevor Hunter*) for the Crown.
I should like to have an opportunity of considering the point raised as to the power to order imprisonment in default of finding a surety in this case.

Darling J.
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Rowlatt J.

DARLING J.: In this case the appellant was indicted for publishing a defamatory libel, to which he filed a plea of justification. The jury found him guilty, and that he had not proved the justification. He now appeals against his conviction and sentence, which was one of twelve months' imprisonment, which was the maximum term for which he could be imprisoned for this offence; he was further ordered, at the end of that term, to enter into his own recognisance with one surety to be of good behaviour or in default to be imprisoned for a further twelve months. The Court intends to refuse leave to appeal against conviction, but to grant leave as regards the sentence, in order that the point raised by Mr. Dodson may be argued when the prosecution is prepared. The Court desires to say that it is much struck by the ability with which Mr. Dodson has argued the case, and is obliged to him for putting the grounds of appeal so clearly, and supporting them by such good arguments as the circumstances permitted.

The first ground of appeal is that the judge misdirected the jury by failing to refer to the two money-lending cases of Vizard and Luther Jones. Mr. Dodson has called our attention to the strength of these two cases, and no doubt there was some ground for making reflections on the conduct of the prosecutor in these matters. If we came to the conclusion that these cases had been withdrawn by the judge from the jury, or their attention not directed to them, it would be proper to give leave to appeal. But it appears to us that he did deal with the cases. A very long plea of justification was put in alleging an enormous number of facts; it was impossible in a summing up to deal with them all. Mr. Dodson has called our attention to the case of *Dinnick*, in which the Lord Chief Justice said: "The appellant, during the trial, raised the defence that he had a right, as an officer of this church, to object to the proceedings which were going on. It may have

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been very foolish and unfounded, but that defence ought to have been put before the jury—this is a paramount principle of our criminal law—so that they could judge whether, in doing what he did, he was ‘wilfully and maliciously’ or ‘contemptuously’ disquieting or disturbing the meeting.” I was a member of the Court in that case, and it is plain that the Court never intended to say that every single observation must be repeated by the judge; the substantial defence must be put to the jury, but not every part or particular of it. If we look and see whether the defence in the money-lending cases was put to the jury, the Court is of opinion that it was. Avory J. dealt with certain cases which were said to show that Trick had been guilty of systematic swindling at considerable length, and as to the others, said: “Now, gentlemen, you have heard the defendant. There are other cases about which evidence has been given. I have picked out those which appear to me to be the strongest, and to require some observation. Because I do not go through the details of the other cases, I am not to be supposed to be withdrawing them from your consideration at all. It is only out of respect to the attention that you have paid to the case, and to the long time that you have been occupied with it, that I do not go through them in detail.” It appears to us that the defence was put to the jury, their attention was called to the evidence given, and the defendant had directed their attention to these cases; we think that the matters were put to them with sufficient clearness and detail.

The second ground of appeal is that it was the duty of the prosecution, when a *primâ facie* case of justification had been made out, to prove affirmatively the falsity of the libel. In this case it cannot be said that a *primâ facie* case of justification had been made out, but evidence had been given on which the jury could find it. The judge invited the jury to say whether they thought a *primâ facie* case had been made out, but they refused to express an opinion, so the prosecution were never put in the position of having to give evidence of the falsity of the libel. The judge only held that there was evidence of justification to go to the jury; he could not say whether a *primâ facie* case had been made out or not.

The other points in the notice of appeal have been very properly dropped, and it is therefore not necessary to deal with them. Leave was sought to call certain witnesses, but there is no witness

suggested who could not have been called at the trial. There is no ground for granting leave to appeal against conviction, but the Court grants leave to appeal against sentence.

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Application for leave to appeal against sentence granted.

Solicitors for the Appellant—*Crowders, Vizard, Oldham & Co.*

Solicitors for the Crown—*Cuthbertson & Powell, Neath.*

A. L. B. T.

GEORGE HAGAN, *alias* WILLIAM SMITH.

Misstatements of fact in directing a jury may be a good ground for quashing a conviction.

This was an appeal against conviction and sentence by leave of Lord Coleridge J. Appellant was convicted of larceny, at the Norfolk Sessions, holden at King's Lynn, on the 16th April, 1913, and was sentenced to nine months' imprisonment with hard labour.

S. P. Low for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There were three indictments for larceny against the appellant, two in respect of overcoats, and one in respect of six bags. He was tried and convicted on the charge of stealing one of the overcoats, being undefended. A witness named Cresswell said that the appellant came to his lodgings with another man at 8 a.m. on the 27th February, took the coat off and sold it to him for sixpence. The appellant cross-examined Cresswell as to whether the time they met was not midday, and gave evidence in chief that he only reached Lynn at that hour, but Mr. Dodson, who prosecuted, asked him in cross-examination why he had not put this to Cresswell, ignoring the fact that he had done so. The Chairman, in his summing up, fell into the same error; he said: "The prisoner did not cross-examine Cresswell as to the fact, as the prisoner alleges, that he could not have been at the lodgings at eight in the morning. Not a word was said by the prisoner in cross-examination then as to the alleged mistake of Cresswell's as to the time in the morning." This was a serious mistake of

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fact. If the Court will look at the depositions, it will be seen that at the police court Cresswell said the interview took place at 2 p.m. Where there is a serious discrepancy between the evidence given at the police court and that given at the trial, it is the duty of the judge to call the attention of the jury to the fact. The depositions were not put in, so it is probable that the Chairman never noticed the discrepancy.

The Chairman also misdirected the jury as to the *onus* of proof; he said: "If Hagan has failed to establish to your satisfaction the fact, first, that he was not in possession of the coat, and, second, that he did not tell the story of how he came into possession of it, you will find him guilty." The jury, although the facts were perfectly simple, deliberated for twenty minutes before returning a verdict, so it is impossible to say that the misdirections did not affect them.

Gerald Dodson for the Crown. The evidence that really carried weight with the jury was that of a constable who asked the appellant to account for his possession of the coat, and to whom the appellant answered that he went to a sale. It is true that the Chairman and I were mistaken as to the cross-examination of Cresswell by the appellant; both talked at once, and it was difficult to follow what was said. The direction as to the law was right; the constable proved possession of property which had been stolen on the previous day; the last words of the summing up were, "If you are satisfied with the story Hagan has given as to the whole matter, and believe that he slept at Wisbech on the night of the 26th, and did not get to Lynn till twelve o'clock at midday on the Thursday, you will find him not guilty. If you are not satisfied with the explanation he has given, and believe the evidence that he was in possession of the coat, then you will have to find him guilty of the offence charged against him." In any case, there was no miscarriage of justice; in opening the case to the jury I explained to them the law of recent possession; the facts were clear, and the time of the meeting with Cresswell immaterial.

ROWLATT J.: In the opinion of the Court this conviction cannot stand, although the result may possibly be unfortunate. The appellant raised the defence that he was never in possession of the coat, and that he was not the man who gave the explanation of

having been at a sale. It was of importance to support that contention that the time at which the person with the coat saw Cresswell should have been accurately stated. Cresswell gave the time as 8 a.m., the appellant as midday. It was important, if Cresswell was mistaken as to the time at which he saw the appellant, that it should have been put in cross-examination, but the summing up assumed that the appellant never took this point. This was wrong, because the substance of his cross-examination of Cresswell was directed to whether a purchase of meat had been made for dinner and not for breakfast, and so pointed to the interview having occurred later in the day than stated by Cresswell. Further, there is some reason to doubt whether Cresswell was right. In the depositions it appears that he gave the time as 2 p.m., while in the depositions in one of the other cases he gave it as 8 a.m. It is very unsatisfactory that evidence so vital should, in the circumstances, have been treated as being beyond suspicion. The real difficulty was never put to the jury; it was treated as a case of recent possession, but even if it was such a case, it was not treated in the proper way in the summing up. The prisoner's explanation in such cases is required not to rebut a presumption of guilt, but to prevent one arising. If it is thought reasonable, there is no presumption and no *onus* on the prisoner. The result is that the conviction is unsatisfactory, and the appeal must be allowed.

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Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BANKES,
AND MR. JUSTICE LUSH.

STEPHEN HERON.

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The statutory notice to an offender under s. 10 (4) (b) of the Prevention of Crime Act, 1908, is subject to the proviso to s. 4 (1) of the Criminal Appeal Act.

The headnote to Fowler, 8 Cr. App. R. 240 (1913), is too widely stated.

This was an appeal against sentence, and an application for leave to appeal against convictions. Appellant was convicted of larceny and of being a habitual criminal, at the Leeds City Sessions, on the 2nd April, 1913, and was sentenced to three years' penal servitude and five years' preventive detention.

W. Jardine for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The conviction for larceny depended on identification, which was a question for the jury and was properly left to them, but the sentence was excessive in view of the fact that the articles stolen were four shawls of the total value of 1s. 6d., which were hanging outside a shop.

On the charge of being a habitual criminal, the three statutory convictions were properly proved, but other convictions which were mentioned in the notice served on the appellant were never properly proved; a detective was asked whether he had a list of convictions, and answered that he had, but never read them out; nevertheless, the Assistant Recorder read out a list, which may or may not have been the same, in his summing up. This was contrary to the decisions in *Stewart*, 4 Cr. App. R. 175; 74 J. P. 246 (1910); and *Culliford*, 6 Cr. App. R. 142; 75 J. P. 232 (1911). The Assistant Recorder misquoted the inspector's evi-

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dence on another point; he represented him as saying that the appellant had never done any honest work in fifteen years except for a fortnight since his last release from prison; what he did say was that in the fifteen years during which he had known the appellant he had been a habitual criminal, and that if work was put at his disposal he was not disposed to take advantage of it for any length of time. The appellant was released from prison on the 20th December, 1912, and committed the larceny on the 22nd February, 1913; in the interval he did a fortnight's work, but said he injured his face, for which he received 1*l.* compensation, and which prevented his working for some time.

Lastly, evidence was given of an alleged offence to which no reference was made in the statutory notice. It was alleged that before the proceedings under the Prevention of Crime Act, 1908, were begun, the appellant wrote to the Chief Constable of Leeds asking to have the theft of a horse and cart of the value of 24*l.* 10*s.* taken into consideration when sentence was passed. Even if it is true, the evidence was not justifiable, and, therefore, the conviction must be quashed. *Fowler*, 8 Cr. App. R. 240 (1913); see also *Maxfield*, 7 Cr. App. R. 230 (1912).

Hallett for the Crown was not called upon.

DARLING J.: In this case the appellant was convicted of larceny, which was not a larceny of a very grave character, and for which he was sentenced to three years' penal servitude. If that were all there was against him the sentence would be preposterous, but in fact the appellant was convicted thirteen times between 1891 and 1909, having on the last occasion received two sentences of five years' penal servitude to run concurrently; he had been out of prison for a very short time when he committed the larceny in question. Mr. Jardine complains of the sentence; it was a sentence which was no doubt passed because it was necessary in order that he should be sentenced as a habitual criminal, but seeing the kind of person that he was, and the way in which he got his living, even if he had not been found to be a habitual criminal a sentence of three years' penal servitude would not have been inappropriate.

The question has been seriously pressed whether the appellant was properly convicted of being a habitual criminal. If found

to be a habitual criminal, the penal servitude will be followed by a sentence of preventive detention, a period in which a man can learn to accustom himself to other habits than those of crime. A distinguished writer, Mr. W. S. Lilly, has advocated that such men should be put on a separate island, and kept to what he terms "industrial serfdom." Preventive detention seems to be a step towards that; it differs from penal servitude, and approaches industrial serfdom. For a man to be found to be a habitual criminal it must be found that he has been convicted three times previously; that was easily proved in this case. In the notice which was served on the appellant no mention was made of a crime committed at Leeds, but evidence was given of it, the evidence being a letter written by the appellant asking that the matter should be taken into consideration. Mr. Jardine says that because this matter was not included in the statutory notice the conviction was bad, and he cites *Fowler*, of which the headnote is this: "Inadmissible evidence of convictions and other charges or other irregularities at the trial which may influence the verdict are not within the proviso to s. 4 (1) of the Criminal Appeal Act as they may lead to a 'substantial miscarriage of justice.'" This is very oddly worded. The proviso is: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." We are of opinion that no substantial miscarriage of justice has occurred in this case through the omission of this matter from the statutory notice. *Fowler* is not an authority for what is contended; that contention is justified by the headnote, but the judgment is not properly represented in the headnote. The proviso applies just as much to the formal notice as it does to graver things. This was a trivial matter; besides that there is ample authority to support the opinion of the Court, such as *Westwood*, 8 Cr. App. R. 273 (1913); and *Marshall*, 5 Cr. App. R. 25; 74 J. P. 381 (1910). It is not necessary to say more than that.

As to the rest, there are no doubt expressions in the summing up which were not very artistic; it is not a model summing up, rather from faults of expression, but here and there matters

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are rather summarily dealt with. On the whole, the Court is of opinion that neither on this point nor on the others put forward by Mr. Jardine has there been any miscarriage of justice.

Appeal dismissed.

A. L. B. T.

ALFRED WILSON.

Severity of sentence.

This was an appeal against sentence by leave of the full Court. Appellant was convicted of attempted suicide, at the West Kent Sessions, on the 10th April, 1913, and was sentenced to eight months' imprisonment with hard labour.

Appellant in person. I was driven to the crime by starvation, being unable to get work. I am now offered help by various societies.

H. C. Dickens for the Crown.

DARLING J.: This man was convicted of attempting to commit suicide, and was sentenced to eight months' imprisonment with hard labour. The reason for that was that in September, 1912, he had been convicted of a similar crime, and sentenced to four months' imprisonment with hard labour. Some charitable societies are now willing to assist him, but we do not care to release him until he is likely to get work. The Court reduces the sentence to one of ten weeks' imprisonment with hard labour; that will expire in a fortnight's time, and work will easily be procured for the appellant at that period of the year. These societies will be informed of the decision of the Court.

Sentence reduced.

A. L. B. T.

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According to the true construction of ss. 4 and 9 of 27 & 28 Vict. c. 47, the Penal Servitude Act, 1864, there is a "conviction" when a prisoner found guilty on indictment or on his own confession is bound over to come up for judgment when called upon, and the effect of such a sentence is that if he holds a licence it is revoked.

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Lush J.

This was an appeal against sentence by leave of Darling J. Appellant was convicted of arson, at the Leeds Assizes, on the 28th April, 1913, before Darling J., and was sentenced, on the 29th April, to five years' penal servitude.

N. L. C. Macaskie for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant pleaded guilty to arson of a stack of straw; he had twice previously been convicted of arson, and had received sentences of three years' penal servitude, at the Devon Assizes, in November, 1904, and five years' penal servitude, at the Taunton Assizes, in October, 1908. At the time of committing the crime now in question he was out on licence and had a *remaret* of one year and ninety-five days of his previous sentence to serve. Darling J. asked the appellant if he would go to sea and behave properly if he was given a chance; the appellant said he would, and the judge thereupon told him that if he were to sentence him he would give him at least five years' penal servitude, but that he would give him a chance. He would have to serve the unexpired portion of the sentence for which he had a licence and would be bound over to be of good behaviour when he came out. The judge warned him that the result would be that if he committed any crime whatever he would be arrested and sentenced in respect of the arson to a term of at least five years' penal servitude. Shortly afterwards the governor of the gaol called the attention of the judge to the following circular, issued from the Home Office:—

"Prison Commission, Home Office Whitehall, 8th November, 1912. A circular L. P., 1912.

"Governors are informed that whenever a prisoner, who is the holder of a penal servitude licence, is brought up for trial on a fresh charge at the Assizes or Quarter Sessions, and the Court decides to bind him over after a verdict or plea of guilty, he

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should be liberated as soon as he has complied with the formalities of the Court. As the conviction is not complete until judgment has been passed, the licence is not forfeited by the conviction. No fresh licence is necessary in such a case.—B. H. Thompson, Secretary."

The judge therefore told the appellant that the question of sentence would have to receive further consideration, and on the following day had the prisoner brought into the dock and read the Home Office circular. He explained that if that circular correctly expressed the law, it frustrated the course which he thought desirable in the case; he had consulted Lush J. on the circular and upon the Penal Servitude Act, 27 & 28 Vict. c. 47, s. 4, and both were of opinion that the circular was wrong. He then passed the sentence of five years' penal servitude, and gave leave to appeal in order that the matter should be settled by this Court.

No doubt there was power to alter the sentence passed. *Inter The Inhabitants of St. Andrew's, Holborn, and St. Clement Dane*, 2 Salk. 605 (1705), but in my submission the Home Office circular is wrong. The forfeiture of the licence depends on the Penal Servitude Act, 1864, s. 4, the material part of which is as follows:—"A licence granted under the said Penal Servitude Acts, or any of them, may be in the form set forth in Schedule (A.) to this Act annexed, and may be written, printed, or lithographed. If any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted, either by the verdict of the jury or by his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction." It will be noticed that "conviction" is defined in this section. The circular seems to have been written on a reading of this section together with s. 9 of the same Act:—"Where any licence granted in the form set forth in the said Schedule (A.) is forfeited by a conviction of any indictable offence, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall,

for the purpose of his undergoing such last-mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence." This section no doubt directs that a prisoner on licence who is convicted and sentenced shall serve his *remanet* after the new sentence. There are several cases which shew that the Court has no power to deal with a *remanet*, or to take it into consideration. *Hamilton*, 1 Cr. App. R. 87 (1908); *Woolley*, 3 Cr. App. R. 57 (1909); *Smith and Wilson*, [1909] 2 K. B. 756; 79 L. J. K. B. 4; 101 L. T. 126; 73 J. P. 407; 271 Cr. App. R.; the only power is to sentence the prisoner for the offence for which he is convicted; this being so the sentence of five years' penal servitude should be quashed. The question would then arise what should be done with the appellant, and as this Court has power to substitute the sentence it thinks proper, I submit that he should be bound over in accordance with the original intention of the judge. On a proper reading of the Penal Servitude Act, 1864, the licence would be forfeited since he has been convicted on his own confession, and will, therefore, have to serve his *remanet*. It is true that there are cases to shew that conviction means conviction followed by sentence, but *Blaby*, [1894] 2 Q. B. 170; 63 L. J. M. C. 133; 10 R. 227; 70 L. T. 879; 42 W. R. 511; 18 Cox C. C. 5; 58 J. P. 576, is to the contrary effect. There is nothing in the terms of the licence to suggest that conviction must mean conviction followed by sentence.

[LUSH J.: If a prisoner was bound over and in consequence had to serve his *remanet*, and after doing so broke his recognisance, with the result that he was sentenced for the offence in respect of which he had been bound over; does not s. 9 shew that he would have to serve his *remanet* at the end of that sentence? The result would be that he would serve his *remanet* twice.]

The purpose of s. 9 is only to shew that the *remanet* must succeed, and not precede, the new sentence, and it would only

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apply where sentence was passed at the time of conviction. If the prisoner is sentenced at a later date owing to a breach of his recognisance, it is not such a sentence as is contemplated by s. 9.

A. Morley for the Crown. Although on s. 4 alone it would seem clear that the licence is forfeited on conviction alone, when that section is read in conjunction with s. 9 the meaning is doubtful. In *Burgess v. Boetefeur and Brown*, 7 Man. & G. 481; 8 Scott (N. R.) 194; 13 L. J. M. C. 122; 8 Jur. 621 (1844), Tindal C. J. said: "The word 'conviction' is undoubtedly *verbum æquivocum*," and the word was differently construed in that case and in *Blaby*. Since there is a doubt as to the proper interpretation of the word, and as on the interpretation depends the liberty of the subject, it is essential that the widest interpretation should be given to the word here. I am informed that the Home Office circular was not based on an opinion of the law officers of the Crown.

[DARLING J.: If a prisoner was bound over and was then indicted on the same charge, could he plead *autrefois convict*?]

I think he could; the point was raised in *Burgess v. Boetefeur and Brown*, and in *Ireland*, [1910] 1 K. B. 654; 79 J. J. K. B. 338; 102 L. T. 608; 74 J. P. 206; 54 S. J. 543; 26 T. L. R. 267; 4 Cr. App. R. 74 (1910). The word "conviction" must be interpreted in the light of the particular statute under consideration.

[BANKES J.: If the licence is forfeited, is not statutory authority required to put the person in prison again? and is not s. 9 required for this?]

When the licence is revoked the convict could no longer be lawfully at large. When a prisoner is bound over the usual intention of the Court is that he should at once be at liberty; the purpose of the circular is probably to secure that intention.

C.a.v.

23 June.

On 23rd June the following judgment was read by Bankes J.:—
The question for decision in this case has reference to the

proper construction to be put upon ss. 4 and 9 of the Penal Servitude Act, 1864. The matter arises in this way: the appellant was indicted at the Leeds Assizes for arson; he pleaded guilty. He had been twice previously convicted of the same offence, and sentenced to terms of three years' and five years' penal servitude respectively. At the time he committed the offence of which he pleaded guilty he was out on licence, having a period of one year and ninety-five days of his last term of penal servitude unexpired. Mr. Justice Darling considered that the best way to deal with the appellant was to bind him over to come up for judgment when called on, being of opinion that the effect of the appellant's plea of guilty would be to revoke his licence and to subject him to serve the unexpired portion of his previous sentence. He accordingly bound him over. The attention of the learned judge was then called by the governor of the gaol to a circular, L. P. 15, 1912, dated November 8th, 1912, and issued from the Prison Commission to the governors of prisons, directing them to release immediately a prisoner on licence who is bound over after a verdict or plea of guilty, upon the ground that the licence is not forfeited as the conviction is not complete until judgment has been passed. On his attention being called to this circular the learned judge recalled the prisoner and sentenced him to a term of penal servitude, giving him, at the same time, leave to appeal, so that the question raised by the aforesaid circular might be discussed. Upon a consideration of the various statutes dealing with the granting of licences to persons undergoing terms of penal servitude, and of the cases cited during the argument, the Court is of opinion that the reason given in the circular for the action to be taken by the governors of the gaols is not well founded.

S. 4 of the Penal Servitude Act, 1864, provides that "If any holder of a licence granted in the form set forth in Schedule A. to the statute is convicted, either by the verdict of a jury or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction." The meaning of the word "conviction" has been discussed in several cases. For instance, in *Burgess v. Boetefeur*, 7 M. & G. 481, where the question was as to the meaning of the word "convicted" in the statute 25 Geo. 2, c. 36, s. 5, and where, after a plea of guilty, judgment had been respited, it was held that

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the offender was not to be considered as convicted until the judgment of the Court upon the indictment against him was pronounced. In that case Tindal C. J., in giving judgment, says that conviction is undoubtedly *verbum æquivocum*. It is sometimes used as meaning the verdict of a jury, and at other times in its more strictly legal sense for the sentence of the Court. In the present case the language of the statute itself seems to settle this question, as it uses the words "convicted by the verdict of a jury or upon his own confession"; but apart from this the judgment of Mr. Justice Stephen in *Jephson v. Barker*, 3 T. L. R. 40, disposes of any possible difficulty, as he there says that a binding over by the Court is the judgment of the Court for the purpose of completing a conviction.

Whichever view, therefore, is taken of the meaning of the word "conviction," there has, in the opinion of the Court, been a conviction within the meaning of s. 4 of the Penal Servitude Act, 1864, whenever a prisoner has been found guilty on indictment by a jury or on his own confession, and has been bound over to come up for judgment when called on. To this extent, therefore, in the opinion of the Court, the circular of the Prison Commission expresses an erroneous view of the law. The further question has, however, to be disposed of: namely, whether, where a prisoner on licence is convicted on indictment and merely bound over, there is any power to keep him in custody or to compel him to serve out the unexpired portion of his sentence. The granting of licences, and their forfeiture or revocation, appears to be entirely regulated by statute. The power to grant a licence is conferred by s. 9 of 16 & 17 Vict. c. 99, the Penal Servitude Act, 1853, which also grants the power of revoking it. The machinery for dealing with a person whose licence is revoked is contained in s. 11 of the same statute, which provides for the issue of a warrant by a magistrate at the instance of one of His Majesty's principal Secretaries of State, and, when apprehended, for the re-commitment by a magistrate of the offender to prison to undergo the residue of the sentence as if no such licence had been granted.

S. 4 of the Penal Servitude Act of 1864 deals with the forfeiture of licences, and provides for two cases in which a licence shall be forfeited:

- (a) The case now under discussion of a conviction on indictment;

- (b) The case of a convict failing to report himself, in which case he is to be deemed guilty of a misdemeanour, and on summary conviction thereof his licence is to be forfeited, but he is not to be liable to any other punishment by virtue of such conviction.

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S. 5 of the same statute creates a number of offences for which the holder of a licence may be punished summarily, and s. 8 provides the machinery for dealing with such an offender after conviction, and, apparently, also with the case under (b), although under s. 4 the licence is already forfeited. S. 9 deals with the case of a person who is the holder of a licence in the form set forth in Schedule A. to the statute, and whose licence has been forfeited by a conviction on indictment for any offence, or is revoked in pursuance of a summary conviction under that or any other statute; and it provides that such a person shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude remaining unexpired at the time of his licence being granted; and it provides for the removal of the convict from the prison in which he may be confined to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace, and for his being dealt with there in all respects as if such term of penal servitude had formed part of his original sentence. For the purpose of giving effect to the statute as a whole, the Court is of opinion that the words from "after undergoing" to "further," in s. 9, should be read as if in parenthesis; and the section consequently must be read as providing that the convict shall, in the event of forfeiture or revocation of his licence, undergo the unexpired portion of his sentence, and in the event of his receiving any sentence for the offence which forfeited or revoked his licence, he shall undergo such unexpired portion after the expiration of such sentence.

This latter part of the section is directed to providing for the sequence of the punishments in the event of the offender, whose licence is forfeited or revoked, receiving any sentence of punishment at the time of his conviction. If he receives none, this part of the section does not apply to his case. Read in this way the section covers all the cases that can occur, and the latter portion

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of it, which applies to every case, provides the machinery by which a person whose licence is forfeited or revoked can be compelled to serve the unexpired portion of his sentence, even though he is only bound over, and not, at the time of conviction, sentenced to any punishment.

For the reasons above stated the Court is of opinion that the circular is not justified by the provisions of the Acts of Parliament regulating licences to convicts, and they are of opinion that the course originally proposed to be taken by Darling J. should be adopted in the present case. The decision of the Court, therefore, is to allow the appeal against sentence, and to substitute for the sentence an order, as originally intended by Darling J., directing the appellant to be bound over to be of good behaviour for a period of two years from the expiration of the unexpired portion of his last term of penal servitude, and to come up for judgment when called on.

Appeal against sentence allowed: judgment varied.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE ROWLATT,
AND MR. JUSTICE ATKIN.

HARRY HARPER.

1913
16 June.

Murder.

Evidence of a mere delusion may not be evidence of insanity.

The Court is not entitled to express an opinion on a jury's recommendation to mercy.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, at the Carmarthen Assizes, on the 2nd June, 1913, before Lord Coleridge J., and was sentenced to death.

W. Lewis for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was a farm labourer, who was charged with the murder of his master; the defence was that the act was committed in a moment of impulsive insanity. The case put forward by the prosecution was a murder without any extenuating circumstances, but the jury, while convicting the prisoner, recommended him to mercy, which, I suggest, shews that their verdict was a compromise. Two doctors who gave evidence for the Crown stated in cross-examination that drink, persecution, and worry were contributing causes to insanity. A doctor called for the defence said that the appellant was a man of weak intellect, and that if such a man drank, or was persecuted, or was known to be subject to delusions, it would point to the fact that he was insane when he committed the murder. The delusion suggested was that he thought he was being watched. The appellant after the murder tried to commit suicide, and there was evidence that he had bought a gun and a cartridge for the purpose of killing himself; I suggested a suicidal mania; the judge commented on the purchase of the gun, and the false excuses given for the purchase, but never suggested to the jury the view of suicide. He dealt with the false excuse as evidence of sanity, but

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this begged the whole question; the gun was bought on the evening before the murder, and the summing up suggested to the jury that if the appellant was sane on that evening they must also find him to have been sane the next day; this was not in accordance with the case for the defence. The judge also put the evidence given by the doctors for the Crown too high; he said their evidence was that the appellant was a man of weak will, but that they had failed to find any trace of what was called insanity in law, or any trace of delusion, hallucination, or absence of power to distinguish between right and wrong. There was evidence of delusions, for the sister of the deceased stated that there was no truth in the suggestion that he was being watched. The conviction was, in consequence, a dangerous one, and leave to appeal should be given.

Ivor Bowen, K.C., and Clement Edwards, for the Crown were not called upon.

DARLING J.: The appellant was convicted of the murder of James Thomas, his master, and was sentenced to death; he now seeks leave to appeal on the ground that the verdict was wrong. Mr. Lewis has taken every point which can be taken in his favour, but he does not suggest that there is any mistake of law or fact in the summing up which would entitle us to quash the conviction, his only point is that one matter was treated by the judge in a different manner to that which Mr. Lewis would have liked. The defence was insanity; there was evidence that the appellant had a grievance against the deceased; he said that he shot him because he had not paid him his wages, and in fact he had not paid him; there had also been a quarrel about some mole-traps. We are asked to say that the jury came to a wrong conclusion. We have considered the whole evidence, and can only say that it was the verdict which any jury would have returned. The jury recommended the appellant to mercy, and on the facts to which Mr. Lewis has referred there may be grounds for giving effect to this recommendation. The Court, however, is not entitled to express an opinion on that point, and does not do so. The application must be dismissed.

Application dismissed.

A. L. B. T.

ALFRED SINSEN, *alias* ALFRED BURTISS.1913
16 June.*Severity of sentence.*Darling J.
Rowlatt J.
Atkin J.

This was an appeal against sentences. Appellant was convicted of larceny, and of being a habitual criminal, at the Swansea Borough Sessions, on the 27th December, 1912, and was sentenced to five years' penal servitude and five years' preventive detention. He was also convicted of larceny, at the Glamorgan County Sessions, on the 31st December, 1912, and was sentenced to five years' penal servitude, the sentence to run concurrently.

Appellant in person. The sentence of penal servitude was excessive. There was only one other charge pending against me, which I asked the Recorder to take into consideration.

A. S. Comyns Carr, for the Crown.

DARLING J.: The appellant has been repeatedly convicted, and is no doubt a habitual criminal; it is unnecessary to go through the list of his convictions, which is a very long one. In this case he pleaded guilty, at Swansea, to stealing jewellery, and was also found to be a habitual criminal; he was sentenced to five years' penal servitude, and five years' preventive detention; the latter is a term which he will be able to reduce by good conduct. He now appeals against the sentences of five years' penal servitude, and the Court thinks, having regard to all the circumstances, they were too severe sentences for the particular crimes; it therefore reduces them to three years' penal servitude.

Sentence reduced.

A. L. B. T.

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Darling J.
Rowlatt J.
Atkin J.

ERNEST CAILES.

Severity of sentence for consecutive terms.

This was an appeal against sentence by leave of the full Court. Appellant was convicted of larceny and of obtaining money by false pretences, at the Surrey Sessions, on the 11th April, 1913, and was sentenced to twelve months' imprisonment with hard labour on each indictment, the sentences to run consecutively.

Appellant in person. The articles I stole were left exposed; I had arranged to repay by monthly instalments the money I obtained. When asked if I had anything to say why sentence should not be passed upon me, I began to speak, but the Chairman interrupted me saying that he would not believe a word I said, and had made up his mind; for that reason I thought it useless to call evidence to character; it is true that I had already been convicted for stealing a postal order, but before that I had been for seven years employed by the London and South Western Railway, four years by Smith and Son, and eighteen months by the Great Central Railway.

James Wylie, for the Crown.

ROWLATT J.: The appellant pleaded guilty to stealing two watches and a ring, and to a second indictment charging him with obtaining 40*l.* by false pretences. He appeals against his sentence, which was one of twelve months' imprisonment with hard labour on each indictment to run consecutively. The 40*l.* was obtained from a woman of very slender resources, to whom the appellant told a series of lies, and he had not even the excuse of want, for he spent it on drink; the sentence passed for this offence was not too much, but the Court will reduce the sentence for larceny to one of six months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

CLEMENT ROBERT TRUEMAN.

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16 June.

Sentence for libel under s. 5 of 6 & 7 Vict. c. 96, the Libel Act, 1843, is not exclusive of the common law punishment for that misdemeanour, which may be the finding of surety or imprisonment in default thereof.

Darling J.
Rowlatt J.
Atkin J.

Severity of sentence in view of a recommendation to mercy.

This was an appeal against sentence by leave of the full Court. (See above, p. 20.) Appellant was convicted of publishing a defamatory libel, at the Cardiff Assizes, on the 18th March, 1913, before Avory J., and was sentenced to twelve months' imprisonment, and ordered to pay the costs of the prosecution; also to enter into a recognisance to keep the peace and be of good behaviour for twelve months, and to find one surety for 50l., or in default to be imprisoned for a further twelve months.

Gerald Dodson for the appellant, who was not present, repeated the arguments against sentence reported above, on p. 22. These were, shortly, that there was no power to order imprisonment in default of entering into a recognisance for an offence under s. 5 of the Libel Act, 1843; and that if there was such power, there was no power to order a period of imprisonment in default, which together with the period of imprisonment passed as sentence would exceed twelve months, the maximum period which could be imposed under that section. Secondly, the judge had given no effect to the recommendation to mercy made by the jury.

Ivor Bowen, K.C. (with him *Trevor Hunter*), for the Crown was called upon on the last point only. The libel was of a serious nature, upon a magistrate who had sentenced the appellant, in 1904, to a term of imprisonment for assault, and the conduct of the appellant in the whole case shews that he is a dangerous man; charges were made by him against everyone connected with the case. The plea of justification was also a great aggravation of his offence.

ROWLATT J.: In this case leave was granted to appeal against sentence passed on the appellant for a conviction under s. 5 of the Libel Act, 1843, for publishing a defamatory libel. The sentence was one of twelve months' imprisonment and that the

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appellant should pay the costs of the prosecution, and further, that the defendant should, before the expiration of his period of imprisonment find a surety and enter into a recognisance to keep the peace and to be of good behaviour for twelve months from his release, or in default to be imprisoned for a further twelve months. The first point that has been argued is that there is no power to award imprisonment in default of finding a surety; it is said that there is no such power at common law. It is quite clear that at common law a misdemeanour might be punished at the discretion of the Court by imprisonment and fine, and by adding a direction that the defendant should find sureties for a reasonable time, and be imprisoned until he did so, the time of the imprisonment being limited to the period for which the sureties were to be found. It may be said that the direction to find sureties is not so much a punishment as a preventive from further crimes. It was settled by *Hart*, 30 How. St. Tr. 1131 (1808); and *Dunn*, 12 Q. B. 1026; 18 L. J. M. C. 41 (1847), that such a direction might be added to the substantive imprisonment. A difficulty arises in this case because the punishment is defined by s. 5 of the Libel Act, 1843, as follows:—"If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the Court may award, such imprisonment not to exceed the term of one year." Of course, if the real construction of the section is that it lays down exhaustively the judgment which can be given, no Court has power to order the defendant to find sureties with imprisonment in default. This section does not, however, create the misdemeanour; it defines it, and its effect is that as regards the imprisonment for a conviction under the section the period is not to exceed one year. If that statute stood alone, we do not think that it could take away the right which existed at common law to add to the appropriate sentence of fine or imprisonment an order that the person convicted should find sureties, or in default be imprisoned; but there are other Acts of Parliament which tend to make one hesitate. The Criminal Law Consolidation Acts of 1861 dealt with felonies and certain misdemeanours, and in the case of felonies there was no power at common law to order a person to find sureties. Each of these Acts contains a section as follows:—"Where any person shall be convicted of any indictable misdemeanour punishable under this Act, the Court may, if it shall

think fit, in addition to or in lieu of any punishment by this Act authorised, fine the offender, and require him to enter into his own recognisances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act the Court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorised: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year." The insertion of this express power in these Acts leads one to imagine at first sight that there is under the Libel Act no such power as is conferred by those statutes, but that view is fallacious. The power exists at common law; it is not taken away by the Libel Act, and the mere fact that statutes passed twenty years later contain such a section as that which I have read, ought not to affect the construction of the Libel Act. It would be very disastrous if the point taken were a good one, and if the Courts were not empowered in a proper case of libel to require sureties in lieu of imposing any punishment at all. If the point was a good one this could not be done.

As regards the sentence no doubt at first sight it seems a strong thing to give a man the maximum sentence when the jury had recommended him to mercy in circumstances not likely to predispose them in his favour; further, the libel, as a libel, might be more atrocious. Still, twelve months are not a long time, and the whole circumstances, including the appellant's conduct at the trial both towards the prosecutor and the witnesses, was very bad. We cannot say that the sentence was excessive.

Appeal dismissed.

Solicitors for the Appellant—*Crowders, Vizard, Oldham & Co.*

A. L. B. T.

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CLEMENT
ROBERT
TRURMAN.

Rowlatt J.

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WILLIAM EDWARD CAWTHRON.

Darling J.
Rowlatt J.
Atkin J.

In the proviso to s. 4 of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885, the words "whose age does not exceed sixteen years" mean at the time of sentence.

This was an appeal against sentence by leave of A. T. Lawrence J. Appellant was convicted of having had carnal knowledge of a girl under the age of thirteen years, at the Cambridge County Assizes, on the 23rd May, 1913, before A. T. Lawrence J., and was sentenced to twelve months' imprisonment with hard labour.

H. St. John Raikes for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant at the time of committing the offence was aged fifteen, but at the time of the trial he was sixteen years old. The judge in passing sentence said that if he thought that the proviso to s. 4 of the Criminal Law Amendment Act, 1885, applied, he would have sentenced the appellant to twenty-five strokes with the birch, but that as he was, when tried, over sixteen he thought he had no power to do so. I obtained leave, however, to appeal against sentence, and my submission is that this is a case where a sentence of whipping can be passed, and that it is the more suitable punishment.

At one time the question arose whether there was any power to order imprisonment at all in view of the Children Act, 1908 (8 Edw. 7, c. 67), s. 102, but s. 123 (1) of that Act makes it clear that the age when the offender is before the Court is the governing factor, and therefore the Children Act does not apply to this case. I submit, however, that under the proviso to s. 4 of the Criminal Law Amendment Act, 1885, the governing factor is the age at which the crime is committed. The words are: "Provided that in the case of an offender whose age does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, ordered him to be whipped, as prescribed by" the Whipping Act, 1862, 25 & 26 Vict. c. 18. The verdict found does not cause the person charged to become an offender, but merely amounts to proof that the appellant became an offender at the date of the offence, and as the proviso stands there is nothing to shew that

the age at the time of sentence, rather than the age at the time of the offence, is the governing factor. But the repealed portion of the proviso indicates what is meant, for under it reformatory treatment was an additional punishment, and different words are used with regard to the age, for it proceeds, "and if, having regard to his age and all the circumstances of the case, it should appear expedient, the Court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school." It is clear that when the proviso as a whole was enacted, it was contemplated that cases might arise where there was power to order whipping, but not to order reformatory treatment having regard to the age of the offender. "Having regard to his age" must mean something. If "whose age does not exceed sixteen years" means the age at time of sentence, the words "having regard to his age" are unmeaning and unnecessary, but if it means, as submitted, the age at the time of the offence, they have a definite meaning as prohibiting the sending of a boy actually over sixteen to a reformatory school. This was clearly intended, but there are no such words limiting the power of the Court in respect of ordering whipping where an offender who was under sixteen at the time of the offence is over sixteen at the time of sentence.

[ROWLATT J.: The words may mean that once the offender is found to be under sixteen, the actual age may be taken into consideration in determining the sentence.]

The Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 14, gave the Court power to send an offender to a reformatory school at the expiration of his sentence if he was sentenced to a term of imprisonment of ten days or longer, and if he, "in the opinion of the Court . . . before whom he is charged is under the age of sixteen years." That referred to the age at the time of sentence, so the offender might be seventeen or more by the time he reached the reformatory. The object of the repealed proviso to s. 4 of the Criminal Law Amendment Act, 1885, was to ensure that boys over sixteen should not be sent to a reformatory. S. 14 of the Act of 1866 was repealed and in effect re-enacted by the Reformatory Schools Act, 1893 (56 & 57 Vict. c. 48), s. 1 and s. 4, and that section, and the latter part of s. 4 of the Criminal Law Amendment Act, 1885, were repealed by the

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Children Act, 1908, and re-enacted. In all these Acts where the age at time of sentence is material, words of limitation have been introduced, words which are lacking in the proviso under consideration. The law therefore has remained the same since 1885, and the distinction has been preserved.

F. K. North for the Crown was not called upon.

DARLING J.: The question to be determined in this case arises in this way. The appellant was convicted of an outrage on a child, and he was liable to be punished under s. 4 of the Criminal Law Amendment Act, 1885, with penal servitude for life; but the proviso to that section says: "Provided that in the case of an offender whose age does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped as prescribed by the Whipping Act, 1862." He was tried before A. T. Lawrence J. At the time of his trial his age was over sixteen years, though at the time of committing the offence he was under sixteen. The judge sentenced him to twelve months' imprisonment with hard labour, but said that, if he had been able, he would have ordered him to be whipped. The whole question appears to be this: when tried is he an offender "whose age *does* not exceed sixteen years"? The section does not say "*did* not," so it must mean at the time when he appears before the Court. Mr. Raikes argues that we ought to come to a different conclusion, because different words are used in this section and in the Children Act, 1908; we cannot see any difference. In s. 131 of the Children Act, 1908, "young person" is defined as "A person who is fourteen years of age or upwards, and under the age of sixteen years"; in the proviso under consideration the expression is "does not exceed sixteen years." Both sections speak of the same period of time, the age at the time when the offender appears before the Court. In the course of the argument I put an extreme case to Mr. Raikes; suppose a person of fifteen committed this offence, and, after due commencement of the prosecution, disappeared for twenty years, and then was arrested and came before the Court at the age of thirty-five. Mr. Raikes says that he could be whipped. The Legislature meant that the punishment of whipping should only be imposed on a person who is somewhere about the age of sixteen.

I do not say that the intention was that no person over sixteen should be whipped, because a person under sixteen when sentenced might be over sixteen by the time he is whipped. If he is over sixteen when he appears in Court, he has lost the immunity from imprisonment conferred by the statute. The appellant here was sentenced to twelve months' imprisonment with hard labour, which we think was the only kind of punishment which, in the circumstances of the case, could be imposed. Nothing is suggested against the period, and the appeal therefore fails.

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WILLIAM
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Darling J.

Appeal dismissed.

A. L. B. T.

GEORGE SIMMONDS.

Severity of sentence.

This was an appeal against sentence by leave of Lord Coleridge J. There was also an application for leave to appeal against conviction and to call further evidence, but only the appeal against sentence is material for the purposes of this report. Appellant was convicted, at the Central Criminal Court, on the 11th April, 1913, before Lush J., of having had carnal knowledge of a girl under the age of thirteen years, and was sentenced on the 14th April to ten years' penal servitude.

Arthur May for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant is a man of forty-two years of age; the girl was aged twelve, and at the time of the trial was pregnant; that fact naturally caused grave prejudice, but should not have influenced the sentence. In *Jillson*, 8 Cr. App. R. 12 (1912), a sentence of ten years' penal servitude was reduced to seven years; the facts of the case do not appear in the report, but I am informed it was a case of incest, an element which is absent here.

R. Oliver for the Crown. The maximum punishment for the offence was penal servitude for life; it was a very bad case with

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deplorable results, for the girl has now given birth to a baby.. Unless there is strong ground, the Court should not interfere with discretion of the trial judge.

DARLING J.: In this case the appellant was convicted under s. 4 of the Criminal Law Amendment Act, 1885. All cases of that kind are very grave, but it must be remembered that the people concerned in this case are of a race which develop at an earlier age than English people. The judge passed a sentence of ten years' penal servitude, and there cannot be much doubt that he was affected by the fact that the child was pregnant, and there must have been great doubt then whether the child would survive. That question may have affected the sentence, which we think in all the circumstances was more than justice demanded. Both the man and the girl are of a different race to the people judging them and applying the law of England to them. Trying not to be rendered indignant by the fact that the girl was rendered pregnant, which was not the offence, we feel that the justice of the case would be met by a sentence of five years' penal servitude.

Sentence reduced.

Solicitors for the Crown—*Wontner & Sons.*

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BANKES,
AND MR. JUSTICE LUSH.

THOMAS FLETCHER.

1913
23 June.

Murder.

A judge has no power to exclude evidence which he holds to be admissible.

On a trial for murder there need not necessarily be a direction that it is open to the jury to find manslaughter.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, at the Worcester Assizes; on the 7th June, 1913, before Bray J., and was sentenced to death.

The Hon. R. Coventry for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was for twelve months previous to the tragedy engaged to Lilian Wharton, and they were to have been married on the 26th March, but when the time came the girl's mother induced her not to marry the appellant. This seems to have upset him very much, and he made up his mind to commit suicide; on the 29th March he bought a revolver, and on the 1st April he was alone in a room with Lilian Wharton when three shots were fired, and she came out saying, "Tom has shot me"; she died from the injury received, on the 8th April. The appellant was found in the room unconscious with two bullet wounds in his head. There was evidence that a few days previously he had threatened her.

Evidence was given of an alleged confession by the appellant. The tragedy took place at about 10 a.m.; he was taken to the hospital and a police sergeant sat by his bed. At about 3 p.m. the appellant became conscious and asked for some water; he then said: "I suppose I shall have to go through with it for this when I get better. It don't matter—I have not killed her—

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it was her fault. I only fired two shots at her. I wish I had killed myself." That is all he said; the doctor said that he was conscious about 4 p.m. when he saw him, but was not fit to be charged till two days later. I objected to the evidence of this statement as inadmissible, being, in the circumstances, not a voluntary statement. The judge ruled, as I submit, wrongly, that the evidence was admissible; he should have said it was unsafe for such statements to go to the jury. An analogous case is the evidence of an accomplice, which the Court holds is not safe to go to a jury, and they are therefore directed to acquit unless it is corroborated.

[DARLING J.: Can you give any instance where the judge may exclude admissible evidence?]

Such cases are within the discretion of the judge, so are not reported. He can advise the prosecution not to press evidence because it is unsatisfactory, and had he known the appellant was not fit to be charged, the judge, when the statement was made, would probably have taken that course. It is true that he advised the jury not to attach too much weight to the evidence, but a jury is always greatly influenced by an admission.

The defence was that the affair was an accident; that the appellant put the revolver to his head, and that the girl struggled to get possession of it. There were three circumstances which were in favour of the defence, namely, the position of the wound in the girl's body; an abrasion of skin on her finger, such as would have been caused in a struggle; and a bullet wound in the appellant's head going from his left eye to his right eye, a fact which no one could account for, as the revolver was found by his right side. None of these matters were mentioned by the judge in his summing up.

Lastly, the judge did not direct the jury on the question of manslaughter, although there was evidence to support such a verdict. It is true I treated the case as being murder or accident, but this did not absolve the Court from directing the jury on the point. If the appellant had attempted suicide, which attempt is a misdemeanour, and in a struggle the revolver went off and killed the girl it would be manslaughter. So it might be if he recklessly flourished the revolver; it would depend on what degree of caution was exercised whether the jury found it to be man-

slaughter or misadventure. *Salmon*, 14 Cox C. C. 494; 50 L. J. M. C. 25; 6 Q. B. D. 79; 43 L. T. 573; 29 W. R. 246; 45 J. P. 270 (1880); *Campbell*, 11 Cox C. C. 323 (1869).

J. Cranstoun and Montefiore Brice for the Crown were not called upon.

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BANKES J.: In this case the appellant asks for leave to appeal against his conviction for murder, at the Worcester Assizes, before Bray J. He was defended there by Mr. Coventry, who represents him to-day. The material facts are in a small compass, and, for the main part, are not in dispute. The appellant was engaged to the deceased, and the wedding was fixed for the 26th March. The appellant was living with his mother and had no home of his own, and the girl refused to accompany him to the registry office. That fact weighed heavily on the appellant; there was a good deal of evidence that, after that, he threatened her, and that she was afraid of him. His state of mind was well before the jury when he said that, in his opinion, the girl was better dead than married to anyone else; there was some evidence that she said that someone else was paying her attentions. The case for the defence was that the appellant bought a pistol in order to end his own life. Having it in his possession loaded, he went to the girl on the Tuesday to say that he meant to commit suicide unless she changed her mind, and produced the pistol; that a struggle occurred in which the girl was accidentally shot. That view was fully presented to the jury by Mr. Coventry, and was the only view put forward by him.

He submits three points on which he says the verdict ought to be set aside. First, that a voluntary statement which the appellant made in the hospital a few hours after the event was not admissible in evidence. No doubt he grievously wounded himself with two shots; he was taken to the hospital and a sergeant sat by his bedside, as was natural. About 3 p.m. he recovered consciousness, asked for some water, which he was given, and then said: "I suppose I shall have to go through with it for this when I get better. It don't matter; I have not killed her; it was her fault. I only fired two shots at her. I wish I had killed myself." When that evidence was tendered it was objected to as inadmissible; the judge held that it was admissible, but that its value was a question for the jury. As to its value,

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Mr. Coventry refers to what the superintendent said, that the appellant was not in a fit state to be charged then; he did charge him two days later. The superintendent was asked if he charged him as soon as he was fit to understand, and answered: "There was no desperate hurry to charge him." Mr. Coventry asks us to infer that the appellant was practically unconscious for two days. The inference I draw is that there was no great hurry to charge him; he was very ill, and it was an act of humanity not to do so at once. Mr. Coventry further contends that it was the duty of the judge to refuse to allow the statement to be given in evidence, even though it was admissible. With this contention the Court does not agree. Where the judge entertains a doubt as to the admissibility of evidence, he may suggest to the prosecution that they should not press it, but he cannot exclude evidence which he holds to be admissible. There may be a question as to the weight of the evidence, but that is for the jury. The judge dealt with the question fully, and warned the jury not to attach too much importance to it. The Court thinks there is no reason for giving leave to appeal on the first ground.

Then Mr. Coventry says that the summing up is unsatisfactory because it does not refer to the position of the wound in the girl's side, the wound on her finger, and the position of the wound in the appellant's head. The last is quite immaterial, because all the evidence is that it was inflicted after the girl had left the room. The position of the wound in the girl's side might have been of weight if it had been said that the girl took the pistol from the man. As regards the wound on the finger it is clear that it was an old wound, and it is only natural to suppose that if she snatched at the pistol it was re-opened. In the opinion of the Court there is no reason for interfering with the verdict to be found in the summing up.

The only other point is that the judge misdirected the jury by not telling them that it was open to them to find a verdict of manslaughter. That is not a matter on which we can lay down a general rule, but in this case it was no part of the judge's duty to do so. There was clear evidence of intention, threats and motive. The judge had to sum up having regard to the evidence and the defence raised by counsel. The only defence was accident. The judge said that the jury ought not to find the appellant guilty unless they thought it was an intentional firing. The Court does

not think this was a case where the judge ought to have told the jury they might compromise the matter by finding manslaughter. There is, therefore, no reason for granting leave to appeal.

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Banks J.

Application dismissed.

A. L. B. T.

MARY JOHNSON.

Where the Court of trial, under a mistake of law, enters a verdict of guilty, when it should have entered one of not guilty, the Court will not apply the proviso to s. 4 of the Criminal Appeal Act, though it is satisfied that the former verdict was correct.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted, at the Surrey Sessions, on the 20th May, 1913, of sending a letter threatening to murder, and was sentenced to twelve months' imprisonment with hard labour.

Appellant was present, but was not represented by counsel. The appeal was based on the verdict of the jury and the discussion which ensued, which was as follows:—"On being asked what their verdict was, the foreman said: 'Guilty of writing and uttering; not guilty of intent to kill—to carry out the threat.'

The chairman: Do you mean by that that they were not serious—nothing but abuse?

The foreman: Nothing but wild abuse—guilty of uttering, but that the threats were not meant to be carried out.

The chairman: Is not that a verdict of not guilty?

Mr. Bucknill (who appeared for the Crown): May I point out the section which says that the latter must threaten to kill or murder. I do not know whether the jury appreciate that if a letter contains a threat it is not material whether the woman intended to carry out the threat.

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The chairman: I think the threat must be a genuine threat, that she must have had it in her mind to do mischief to somebody.

Mr. Bucknill: I quite agree. The jury did not think that the woman intended anything serious by the threat. I understood you to say that it must be a genuine threat, not vulgar abuse. If it is a serious threat, then the mere fact that the woman did not intend to kill does not matter; she might merely intend to drive the people out of the locality.

The clerk of the court: I think it is really meant to prevent people frightening people out of their lives.

The foreman: Might I explain? The finding of the jury with regard to the threat was based upon your summing up that we must consider whether there was a real intent. We find that there was not any real intent to kill.

The chairman: Guilty of writing and uttering the letters, but not guilty of the intent to carry out the threat of murder. There was no real intent.

The foreman: There was no real intent.

The chairman: Do you consider that the letter does amount to a threat to kill and murder?

The foreman: It amounts to a threat on the wording of the letter.

The chairman: But you do not think she intended to carry it out?

The foreman: Yes.

The chairman: But in the letter there was. Now I do not know what to do.

Mr. Raphael (who appeared for the prisoner): The word "maliciously" has been used, therefore the finding of the jury would have a very great bearing on the question.

The clerk of the court: 'Maliciously' is merely intentional.

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The bench then consulted, and it was decided to enter a verdict of guilty."

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A. T. Bucknill for the Crown. The question is whether to constitute an offence under the section it is necessary that there should have been an intention to carry out the threat. The summing up of the chairman on the point misled the jury, and was incorrect, because he told them that they must consider whether the writer intended to carry out the threat to kill contained in it. There was ample evidence of malice on appellant's part. The whole fight at the trial was whether the appellant wrote the letter or not.

DARLING J.: The appellant was tried before Sir Charles Walpole, at the Surrey Sessions, on an indictment charging her with having, on the 16th April last, feloniously and maliciously sent to Eliza Woodman a certain writing, threatening to murder her, well knowing the contents of the said writing, and in a second count with having feloniously and maliciously uttered the said writing. She was accused under the statute of having sent the letter maliciously. The question arises whether the chairman gave a proper direction; the Court thinks he did not. He did not appreciate that the gravamen of the charge is not in sending the letter or in meaning to carry out the threat contained in the letter; the offence is in maliciously sending and uttering the letter. When he had summed up, the jury brought in a verdict in the following terms (his Lordship then read the passage from the shorthand note quoted above). There may be a ruling of *Martin B.* that "maliciously" means "on purpose," but that is not material, because the uttering was intentional; the letter was put under the door. More is meant by "maliciously" here. In order to understand the meaning of the word the chairman, if he tries a similar case again, cannot do better than read the judgment of this Court in *Syme*, 73 J. P. 535; 55 S. J. 704; 27 T. L. R. 562; 6 Cr. App. R. 257 (1911), in which a definition of the word which had been given by the judge who tried the case, was approved. To allow it to be stated by the clerk that maliciously merely means intentionally after the real point had been raised by counsel for the

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defendant is to omit the most important ingredient in the offence. This is not a case in which we can take advantage of the proviso to s. 4 (1) of the Criminal Appeal Act, in consequence of the irregularity that occurred. It was only after a confused explanation, and after what we think was a wrong interpretation of "maliciously" that a verdict of guilty was entered. We have come to the conclusion with considerable regret that the conviction must be quashed. We understand that true bills were found against the appellant on two other indictments, so there will be an opportunity of putting the matter right by trying her on one of these. She must remain in custody until those indictments are disposed of.

Conviction quashed.

A. L. B. T.

JEANNIE BAXTER.

When, on a trial for murder, a judge has recommended a verdict of manslaughter on a finding of not guilty of murder, the Court may ask the jury whether they find manslaughter.

Severity of sentence.

This was an appeal against conviction on a point of law. Appellant was convicted of manslaughter, at the Central Criminal Court, on the 3rd June, 1913, before Rowlatt J., and was sentenced to three years' penal servitude.

Marshall Hall, K.C. (with him *Valetta* and *D. W. Corrie*), for the appellant, who was present. The appellant was charged with the murder of Julian Bernard Hall and was convicted of manslaughter; the main ground of appeal is that there was only evidence of murder or of accidental killing, and none of manslaughter. The case put by the prosecution was one of murder, but before I addressed the jury the judge said that he thought he ought to tell the jury that the facts and circumstances of the case were so obscure that it would not be safe for them to find murder, but that they might find that it was manslaughter. I said that if the evidence fell short of establishing a case of murder, and there was no evidence of manslaughter, that would not be a proper verdict.

The case for the prosecution rested on medical evidence, which was not challenged, and reiterated expressions of an intention to kill, which were very relevant to a charge of murder, but which the judge brushed aside. The facts shewed that the appellant, who until a few months before had been provided for by another man, had then become acquainted with Hall and become infatuated with him. There was conclusive evidence that he had treated her with violence more than once. On the evening of the 14th April a witness named Caswell telephoned to the appellant asking her to go to Hall, who was not well, and on the following morning she went to Denman Street, where he had a small room, and found him in bed. Breakfast was brought up by a valet at 9 a.m., and from then until 10.30 a.m. the only evidence as to what happened is that of the appellant. She says they discussed marriage; Hall got excited, got out of bed and struck her, knocking her breath out; he then got back into bed with a loaded revolver, which was his property. Then there was a discussion as to his will; he had already made a will, under which she benefited largely; she asked what would become of her child if anything happened to her, and he then drew up a fresh will giving to the child all that the appellant would have had under the earlier will, and the cook and valet were sent for to witness it. They said they were told by Hall that he was going to be married, and that the two were apparently on good terms. Then Hall got into bed after locking the door; there was independent evidence that the door was locked. There is no doubt that Hall was an extremely heavy drinker, and was a man of great strength and without fear; he had by then had several glasses of brandy and soda. Hall was in bed playing with the revolver, and the appellant said she was terrified. He said: "Bill, it is no good; I cannot keep my promise; it is better that I should finish it." She thought she must try and get the the revolver from him, and she tried several times. He said: "Do you think you could take it from me?" and having it pointed at his own head, said: "I dare you to pull the trigger." She said: "I am not such a coward," and at the same time caught hold of his hand trying to get it away. She explained that Hall was holding the revolver at arm's-length, pointed towards himself, with his thumb on the trigger. Then, she said, in the struggle two shots went off and he dropped the revolver, which she seized, and discharged the remaining four cartridges at the ceiling. She

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rushed out and saw Caswell, to whom she said: "Run and fetch a doctor, Jack has been shot; I hope it is not serious." This statement is quite consistent with her having shot him accidentally. The only other evidence as to the firing of the fatal shot was that experts said it was discharged at a distance greater than eighteen inches.

I say that on the evidence no jury would have convicted the appellant of murder; it would have been quite unsafe to do so. There were no facts which would justify a verdict of manslaughter, for sympathy is not such a fact; moreover, no definition of manslaughter was given by the judge to the jury; they were told that provocation might reduce the crime to manslaughter, but there was no evidence of provocation. The jury recommended the appellant to mercy; this shews clearly that if they had been told that they must either find her guilty of murder or acquit her, they would have acquitted her.

R. D. Muir and Cecil Whiteley for the Crown were not called upon.

DARLING J.: In this case Jeannie Baxter was tried on an indictment charging her with the murder of Julian Bernard Hall, and was convicted of manslaughter, after a defence in which it was not contested that he was killed by a pistol, and that there was evidence to shew that she fired the pistol, and made statements afterwards to the effect that she had shot him. Mr. Marshall Hall complains that the judge, in his summing up, told the jury that they might find her guilty of manslaughter, and, indeed, suggested that they should do so. It is plain that, as an advocate, Mr. Marshall Hall might well complain of this. The jury might have thought that the deceased was a man of whom the world was well rid, and so have sympathised with the appellant, and Mr. Marshall Hall may have hoped for an acquittal which he ought not to have got. The question is whether there is any ground on which we can quash the conviction. Mr. Marshall Hall says there is no evidence that she fired the shot at all; we think there is plenty; what she said, the circumstances of Hall's death, the wounds and the bullet marks are all satisfactory evidence to shew that it was her firing the pistol that killed him. Then what is the law? It is well settled that homicide is murder unless it is

shewn to be something else. Once the fact of killing is established, the presumption is that it is murder-unless on the circumstances the jury can find it to be manslaughter or accident. They are bound, if there is a doubt, to resolve it in favour of the prisoner. We must take it that the jury were satisfied that the appellant killed the deceased; if they were wrong, it was in giving her the benefit of a doubt when she ought, by strict law, to have established that it was manslaughter. The jury found that Hall died of a shot fired by her, so it was at least manslaughter, for it was not excusable or justifiable; so they said they would not go on to enquire whether the prosecution had established that it was murder, or whether she was absolutely entitled to a verdict of manslaughter. They decided to find her guilty of manslaughter, a course which the circumstances of the case, the provocation and ill-treatment received and the undesirable character of the person killed, justified. At the least she was guilty of manslaughter; it may be that she was guilty of murder. The jury were asked if they found the prisoner guilty of murder; they said: "Not guilty." Then they were asked if they found her guilty of manslaughter. It seems to us that it was right to put this question to them, for the judge finished his summing up with a reference to manslaughter; it is plain that, when they said she was not guilty of murder, they had not exhausted the questions they had to decide. So then they found her guilty of manslaughter, and we are perfectly satisfied with the verdict. She was sentenced to three years' penal servitude, a sentence with which the Court cannot disagree on the ground that it was too severe.

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Appeal dismissed.

Solicitor for the Appellant—*J. K. Torkington.*

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BEFORE
MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE
BANKES, AND MR. JUSTICE ATKIN.

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JAMES WILLIAM POSNETT.

When on the trial of an indictment evidence relative to another indictment has been admitted the Court will quash a conviction.

The prisoner was convicted on 20th May, 1913, at the Surrey Quarter Sessions, on charges of receiving sacks of rags and a coster's barrow, and sentenced to twelve months' imprisonment with hard labour. He appealed, by leave of the Court, against his conviction.

H. W. Rowsell for the appellant, who was present. In this case the evidence of identification was very unsatisfactory. A witness who professed to identify the prisoner admitted that he saw the prisoner for the first time in the dock with another man. There was no proper identification of the goods—rags—which formed the subject of the charge against the prisoner. It was alleged that he was wheeling a cart containing the rags, or that they were in the possession of a man with whom he was alleged to have been seen. On his arrest the police officer told him he would be charged with stealing rags and stamps; the latter were charged in a second indictment. Appellant, referring only to the stamps, said: "It was the stamps done us in; we were both drunk." The second indictment was not tried, and that statement was taken to refer to the rags. If it did not, there was nothing to connect appellant with the stolen rags.

C. B. M. Hodgson for the Crown. The witness who was called to identify the prisoner as a man who had offered him the articles

on the following afternoon was twice asked at the trial whether he identified the appellant. The appellant was not in custody when he identified the other prisoner at the police court. The prisoners were indicted for another burglary the same night, where they were alleged to have stolen stamps and other articles from a sub-post office. The burglaries were connected by the fact that a tin stolen from the post office was found in the warehouse whence the rags and barrow were removed. The appellant when arrested stated to the detective, "the stamps done me"; this connected him with the other offence.

On the question of identity of the rags and barrow, the jury had to decide on the whole facts of the case; it was impossible to prove the identity of such common articles as sacks of rags and a coster's barrow. There were several previous convictions.

[ATKIN J.: The question of identity was apparently never left to the jury.]

BANKES J.: The Court is of opinion that this conviction must be quashed. At the time of his arrest there were two charges against the appellant, and he made a statement to the detective which referred to both charges. Upon his trial on one of the charges the detective endeavoured to split up the statement and to give in evidence only that part which he considered applied to the charge upon which the appellant was tried. The evidence so given was not in the opinion of the Court satisfactory, as the effect of what the appellant said was not correctly reproduced. There was no evidence of identification of the goods beyond this statement, and the question whether the identification was sufficient was not left to the jury. In these circumstances the conviction cannot stand, but the appellant must remain in custody until he can be tried on the other charge.

Conviction quashed.

Solicitor for Appellant—Percy W. Taylor

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JAMES DAVIS.

Lawrence J. *A statement by a defendant implicating himself and a co-defendant is not*
Bankes J. *evidence against the latter.*
Atkin J.

This was an appeal by leave of Bankes J. against a conviction for larceny, at the County of London Sessions, on the 12th June, 1913. The sentence was fifteen months' imprisonment with hard labour.

Arthur Page for the appellant (under s. 10 of the Criminal Appeal Act), who was present. In this case the appellant and one Richfield were jointly charged with stealing a barrow, a set of harness, and a donkey, the property of William Jones, on May 29th, 1913, in Cubitt Road, Dulwich. Both prisoners were convicted, but Richfield did not appeal. I submit that having regard to the evidence the conviction of the appellant cannot be supported. The evidence was to the effect that the two prisoners met Jones with his barrow in Cubitt Road, and that the appellant falsely suggested to Jones that there was a house down the road at which a number of bottles could be bought. The prosecutor went down the road, and on his return, found that the prisoners, as well as the donkey and barrow, had disappeared. In the evening the appellant was arrested at Deptford, and the following morning Richfield was charged, at Old Street Police Court, with being found drunk in charge of the donkey and barrow. The charge was dismissed, and Richfield was subsequently charged with the larceny in question. A detective-sergeant gave evidence that when arrested Richfield said: "I don't know what Davis done with the clothing. I can't remember what we done with them." Apart from the evidence of this admission, there is no evidence upon which the jury were entitled to convict the appellant. But the admission of Richfield is clearly inadmissible as against the appellant. I therefore submit that the conviction cannot stand. It is probable that the jury in arriving at their verdict were influenced by this admission of Richfield, and upon that ground alone I submit that the conviction ought to be quashed.

C. B. M. Hodgson for the Crown. There was evidence to go to the jury that appellant sent the prosecutor off on a wild-goose

chase after the bottles in order that the other man might make off with the donkey and cart.

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A. T. LAWRENCE J.: There was not sufficient evidence to justify the jury in convicting the appellant on this charge of larceny, for there would appear to be no connection between the fact of the prosecutor going down the street to fetch some bottles and the offence charged against the appellant. A suggestion appears to have been made that there was a conspiracy, but the Court does not consider that this suggestion is well founded. As has been pointed out, the donkey was found in the possession of the other man, and there is little or nothing to shew that the appellant had anything to do with the theft.

Conviction quashed.

R. F. B.

AUGUSTUS LEARY.

The Court will grant leave to appeal when it has prima facie reason to believe that the jury was misdirected.

This was an application for leave to appeal (which had been refused by Banks, J.) against a conviction for larceny and receiving, at the Central Criminal Court, on 30th May, 1913, and also against the sentence of eighteen months' imprisonment with hard labour passed by Mr. Commissioner Rentoul.

A. C. Fox-Davies for applicant, who was not present. In this case the jury could not at first agree upon their verdict, and only arrived at a conclusion after a good deal of further consideration.

The main evidence for the defence was directed to the question of identity, and that for the prosecution on this point rested almost entirely on the evidence of one policeman. A statement was made in the witness box by that witness which comprised the words "knowing the prisoner as I do, that gave me an idea that they were stolen," or words to that effect, and this must have prejudiced the prisoner unfavourably in the minds of the jury. Moreover, there was no question of character in issue, and the remark of the

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constable was an abuse of the rules of evidence. The evidence shewed that a man was seen pulling a barrow upon which were the stolen goods. Shortly after that the appellant crossed the road and spoke to him, and "directed him to Clifton Street." At the trial it had been submitted that this did not in law or fact amount to evidence of the possession of the goods by the prisoner, but the learned judge refused to withdraw the case from the jury. The main defence was an *alibi*, but it still remained for the jury to determine the fact whether from the evidence above stated it could be found that appellant was in possession of the stolen property. Instead of leaving this point to the jury the learned judge commenced his summing up in these words: "Gentlemen of the jury, two men are in possession of a stolen barrow of boots: there is no question about that at all." In his summing up the learned judge somewhat emphasised the statement referred to, and assumed that the evidence given by the police was satisfactory, and also that the relations of appellant who were called to support the *alibi* would naturally give evidence in his favour. I submit that it was not improbable that two married daughters should be at their mother's house on the same day, and that their evidence as to appellant's movements was satisfactory.

BANKES J.: The defence put forward on behalf of the applicant in this case was an *alibi*, and witnesses were called in support of it. The evidence for the prosecution was slight in character, and depended almost entirely on the testimony of the police. The jury were not asked whether they were satisfied as to the question of identity, and the learned judge at the trial appears to have assumed that the evidence given by the police was satisfactory, without leaving the question as to its value for the determination of the jury. The learned judge also, no doubt, directing his attention to the *alibi*, which was the main defence, did not leave to the jury the point whether they were satisfied by the evidence that appellant was in possession of the stolen property. The Court will grant leave to appeal against the conviction.

Leave to appeal granted.

Solicitor for Applicant—W. L. Dagg.

R. F. B.

FREDERICK RODLEY.

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On the trial of an indictment for burglary with intent to rape, evidence of immoral conduct subsequent to the attempt alleged, is not admissible against the defendant.

Fisher (3 Cr. Ap. R. 176; 1909) and Bond (1906, 2 K. B. 389) followed.

This was an appeal, by leave of the full Court, against a conviction at the Caermarthen Assizes, before Lord Coleridge J., on June 3rd, 1913, for burglary with intent to rape, and a sentence of seven years' penal servitude was passed. There was a second indictment charging the prisoner with burglary and larceny, which was not tried.

T. W. Langman for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The facts put forward by the prosecution were that on a Saturday night, the 19th April, the appellant broke into the house of a woman named Annie Gwendoline Jones late at night, and, according to her story, attempted to have connection with her against her will. There was a struggle in the kitchen, and the woman's father, an old man, came down on hearing a disturbance. Evidence was also called to shew that appellant had later in the same night proceeded to a house two miles or more away and had remained with the woman occupant of the house with her consent. Appellant's defence was that he was admitted into the house by prosecutrix and that he was courting her.

My first submission is that the verdict was unreasonable having regard to the evidence and the nature of the first indictment. In an indictment charging burglary with intent to commit a felony, the intent must be proved to have existed in the mind of the prisoner at the time he broke in. The acts of the prisoner must go to prove that the particular intent existed at the time of the entry. A subsequent intent does not satisfy the charge laid in the indictment. In 2 East, P. C. 514, it is stated that "the intent proved must either correspond or be included in the intent alleged. Thus it will be a fatal variance if an indictment for burglary charge an intent to steal and that it be shewn that the real intent was to commit a rape or murder." In this case there was evidence of intent to steal, and no satisfactory evidence of intent to rape at the time of breaking in. See *Cruse*, 8 C. & P.

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541; 2 Moo. C. C. 53 (1838); *Tucker*, 1 Cox, C. C. 73 (1844). In *Tucker*, Alderson B. stated "it is the immediate intent with which the entry is effected that is the material one, and not a remote intent having no immediate connection with that entry." In this case the only evidence of intent is the lateness of the hour at which he broke in, the fact that the prisoner had taken his boots off, and the alleged attack on the girl in the house. The first two pieces of evidence are quite consistent with the prisoner's story that he went to court the girl. It is customary in parts of Wales to do this with boots off and at a very late hour. The prosecutrix stated that she had missed money from the house, and therefore on all the facts it is more probable that the entry was effected, if at all, with intent to steal. An intent to commit a rape at the most can only be said, from the evidence before the Court, to have appeared after the entry. If this be so, the intent charged in the indictment is "a remote intent having no immediate connection with the entry," and cannot support the indictment. There was no evidence before the jury from which they could reasonably infer the intent alleged. The prosecution should have alleged different intents in different counts, or should have proceeded with the second indictment in which burglary together with larceny was charged.

The second ground of appeal is that the evidence with regard to the entry into the second house on the same night and the fact that the appellant had connection with a woman there, apparently with her consent, was wrongly admitted. This evidence was put forward as shewing the intent of appellant when, as alleged, he broke into the house of the prosecutrix. At the trial the learned judge allowed it to be given on the ground that the defence put forward on behalf of appellant was not consent. I submit that the evidence of this subsequent act occurring some time after the offence charged could not prove the intent at the time of breaking into the former house. In the case of *Makin v. The Attorney-General* (N.S.W.), (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox, C. C. 704; 58 J. P. 148, Lord Herschell C. said "it is very difficult to draw the line and to decide whether a particular piece of evidence is on one side or the other." In the present case the admission of such evidence, while not being conclusive as to intent, tended to prejudice the prisoner with the jury and to prevent a fair trial on the facts charged. This

evidence would only shew that the prisoner was an immoral man and not be any direct evidence of a particular fact in issue. To be admissible such evidence should shew either a criminal act of the same nature as the offence charged or rebut a possible defence, or be connected in the relationship of cause and effect with the facts charged in the indictment. This evidence does not satisfy either of these requirements. Further, it cannot be said to shew system, and therefore is not admissible on the grounds outlined in the cases relating to system.

The learned judge in his summing up referred to this evidence, and stated that the suggestion of the prosecution was that appellant was raging with lust, and being foiled as regards the prosecutrix, immediately went to gratify his passion in another house and upon a woman who would yield.

The evidence, I submit, was relevant as far as it shewed the fact that the man was in the neighbourhood of the house of the prosecutrix, but irrelevant as far as the acts committed in the second house are concerned.

The second house was two miles distant from the house of the prosecutrix, and it is impossible to assume that a lustful desire existing in the second house is in any way proof of an intent to rape existing at the time of breaking into the other house half-an-hour or more previously. Further, in no circumstances could an intent to rape be presumed from subsequent connection with a woman with her consent.

E. M. Samson for the Crown. I submit that the condition of a man's feelings is the best evidence of his intention. The jury could infer the intention of the appellant from the facts given in evidence as to a second alleged occurrence on the same night. *Rhodes*, 1899, 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; C. C. R.

LAWRENCE J.: The Court will consider the point as to the admissibility of the evidence given in relation to the second alleged occurrence.

C.a.v.

MR. JUSTICE BANKES read the following judgment: This is the judgment of the Court consisting of Mr. Justice Lawrence and myself and Mr. Justice Atkin.

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The appellant was tried at the last Caermarthen Assizes before Mr. Justice Coleridge upon an indictment which charged him with having on April 20th last in the night time burglariously broken and entered the dwelling house of John Jones with intent to commit a felony, that is to say, with intent to ravish one Annie Gwendoline Jones.

It appeared from the evidence given at the trial for the prosecution that Annie Jones was living alone with her father in a cottage, and that on the night in question she heard a noise in the house between twelve and one in the morning; that she got up to see what was the matter and found the appellant coming up the stairs with his cap down over his eyes and face and with his boots off; that she shouted at him, upon which he went downstairs; that she followed him and hit him two blows on the head with a stick; that she then recognised him as a man whom she had known for some years, and who had worked in the neighbourhood; that she then spoke to him by name, whereupon he sprang at her, knocked the candle out of her hand and seized her, putting his hand over her mouth and forcing her against some boxes; that he pulled up her clothes and told her that if she did not give in to him he would not mind killing her; that she managed to get away from him and get outside the door, when, by the light of the moon, she saw that his trousers were down; that at this point her father, who was lame and infirm, came on the scene, and the appellant went away; that upon examination it appeared the appellant had got into the cottage by forcing the back door.

The appellant was arrested a few days after the occurrence, when he denied having been at the place at all.

Before the magistrates the appellant stated that he called no witnesses and that he had nothing to say.

Before the magistrates a woman was called as a witness, who deposed to the fact that about two o'clock on the same morning as that deposed to by Annie Gwendoline Jones, the appellant had come to her house where she lived alone, and had gained access to her bedroom by coming down the chimney, and that he then had connection with her with her consent. Her house was about three miles from that of Annie Jones.

At the trial before Mr. Justice Coleridge, the appellant was defended by counsel, and the course the proceedings took was as follows. The first witness called was Annie Gwendoline

Jones. She was cross-examined with a view of establishing that the appellant came into the cottage by her permission and that nothing of the kind suggested by the witness had taken place, and that the appellant had merely "courted" her, and that whatever had occurred while she and the appellant were in the kitchen was consented to by her.

After the father had been called to corroborate his daughter's story, the woman to whose house the appellant subsequently went was called. The learned judge, evidently anticipating an objection to the evidence, addressed the counsel for the prisoner, and the following is an account from the shorthand note of what occurred.

"Mr. Justice Coleridge: Mr. Langman, in regard to this witness's evidence, it all depends upon what the defence is. Is your defence that he was not there at all? Mr. Langman: No. Mr. Justice Coleridge: Is it your defence that he was drunk? Mr. Langman: No. Mr. Justice Coleridge: Is it your defence that she consented? Mr. Langman: Yes; he was invited there, that he went there merely to court the girl. Mr. Justice Coleridge: That she consented? Mr. Langman: He never went there to commit the offence. Mr. Justice Coleridge: Then I shall take this evidence. Mr. Langman: That there was consent to this extent, that she allowed him to court her. Mr. Justice Coleridge: The charge is that he attempted to rape her. It would be a defence if she consented. If your defence is that she consented, I think it is very open to question whether it would be relevant for reasons which I need not give now. Mr. Langman: In view of the prisoner's statement I am unable to put that defence forward. Mr. Justice Coleridge: Consent? Mr. Langman: Yes, because he never went there with the intention to commit any offence." The evidence of the woman was then proceeded with.

The appellant's counsel now contends that the woman's evidence ought not to have been admitted, and that the conviction cannot stand. Of recent years the question as to the admissibility upon a criminal trial of evidence of the commission by the accused of a previous or subsequent offence has been frequently before the courts, and as these decisions have a direct bearing upon the present case, it may be convenient to collect together in one report the various rules which have been formulated by which the admissibility of such evidence may be tested. In *Rex v. Mean*, 21 T. L. R. 172; 69 J. P. 27 (1904); C. C. R., Mr. Justice Wills called attention

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to a fact which is sometimes overlooked, that the laws of evidence are the same in civil and in criminal cases. In *Rex v. Fisher*, 1910, 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. Ap. R. 176, Mr. Justice Channell puts the point thus. He says: "The principle is clear, and if the principle is attended to, I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible, because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence." As here pointed out by Mr. Justice Channell, the governing rule must always be that any evidence to be admissible must be relevant to the issue. The most recent decisions which lay down rules by which the relevancy of evidence which tends to prove offences other than those covered by the indictment may be tested are the following: *Makin v. Att.-Gen. for New South Wales*, [1894] A. C. at p. 65, where the Lord Chancellor lays down the rule in these words: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." In *Bond*, 1906, 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox, C. C. 252; 22 T. L. R. 633; 54 W. R. 586; C. C. R., Mr. Justice Darling and Mr. Justice Bray call attention to the fact that

Lord Herschell's last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the Lord Chancellor should be read with that limitation. In the same case Mr. Justice Bray says that a careful examination of the cases where such evidence has been admitted, shews that they may be grouped under three heads: 1. Where the prosecution seeks to prove a system or course of conduct. 2. Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. 3. Where the prosecution seeks to prove knowledge by the prisoner of some fact. In their judgments in this case it is pointed out by several of the learned judges who formed the majority of the Court that a single prior act of a like criminal nature would in general not be admissible as evidence of a system. In the more recent case of *Ball*, 1911, A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox, C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. Ap. R. 31; 5 Cr. Ap. R. 238, the Lord Chancellor, in speaking of the grounds upon which he held that the evidence there objected to was admissible, says: "Further evidence was then tendered to shew that these persons had previously carnally known each other and had a child in 1908. The object was to establish that they had a guilty passion towards each other, and that therefore the proper inference from their occupying the same bedroom and the same bed was an inference of guilt, which is the same thing in another way as saying that the defence of innocent living together as brother and sister ought to fail." The first ground given by the Lord Chancellor for the admissibility of the evidence suggests an extension of the rules indicated in the cases above referred to, but the second ground comes within the rule previously indicated that evidence is admissible to rebut a defence really in issue. In summing up to the jury in the present case the learned judge, in referring to the evidence which is now objected to, puts the case in this way. He says: "Then he (the appellant) goes away, and the next thing that is heard is that hardly a stone's throw off the farm lives a woman with whom he has already had immoral intercourse. The suggestion of the prosecution is that he is raging with lust, and that, being foiled as regards the prosecutrix, Miss Jones, he immediately went to gratify his passion upon the woman whom he knew would not be unwilling to yield."

Is the evidence objected to admissible upon the ground thus

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indicated by the learned judge, or under any of the rules formulated in the cases above referred to? This Court is of opinion that the evidence is not admissible. At the point in the trial at which the evidence was tendered, the defences really in issue were: 1. That the appellant never broke into the house at all. 2. That the appellant did not break into the house with any intention of committing a rape. 3. That the prosecutrix's story as to what occurred in the house was not true. The evidence which was objected to was not in the opinion of this Court relevant to any of those issues, and was not therefore admissible to rebut any of the above defences. If the jury believed the evidence of the prosecutrix, the only issue was whether in the opinion of the jury the acts of the appellant amounted to an attempt to rape, and whether from his acts the jury would infer that the appellant broke into the house with the intention of committing a rape. In the opinion of this Court, upon neither of those issues was the evidence objected to relevant. The conclusion therefore arrived at by this Court is that the evidence objected to was not admissible on any ground, and ought to have been rejected.

The question then arises whether this is a case in which this Court can take advantage of the proviso to s. 4 of the Criminal Appeal Act and say, that in spite of the admission of the evidence, there has been no substantial miscarriage of justice. Upon this question the Court of Criminal Appeal is always at somewhat of a disadvantage compared with the judge who heard the case and who saw the witnesses, and was acquainted with the impression made by those witnesses upon the jury. The rule adopted by this Court, however, has been that it will not act upon the proviso in any case in which it appears to them clear that the jury may have been influenced by the evidence wrongly admitted.

The Court are unable in the present case and upon the materials before it to say that the jury may not have been so influenced, and their decision, therefore, is that the conviction must be quashed.

The learned judge added that there was another indictment against this appellant, and that the Court thought that he should be tried upon that, and he might make the usual application for bail, and if it was thought to be a proper case bail would be granted to him and he would be tried at the next assizes.

Conviction quashed.

R. B. F.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE BRAY, AND
MR. JUSTICE A. T. LAWRENCE.

GEORGE WILLIAM HULME.

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An indictment under s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), is not bad because the words "being an act which the said" prosecutor "had a legal right to do or abstain from doing" are omitted, provided the allegation of the offence follows the statute.

This was an appeal against conviction on a point of law. Appellant was convicted under s. 7 of the Conspiracy and Protection of Property Act, 1875, at the Salford Hundred Sessions, on the 9th June, 1913; sentence was postponed.

Roe Rycroft for the appellant, who had been granted bail. This prosecution arose out of a carters' strike that took place at Stockport in April, and the appellant was convicted under s. 7 of the Conspiracy and Protection of Property Act, 1875, which is as follows: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority" does certain things which are set out in five sub-sections, "shall on conviction thereof by a Court of summary jurisdiction or on indictment as hereinafter mentioned," be liable to certain penalties. The offence specified in sub-s. 5 is: "Follows such other person with two or more other persons in a disorderly manner in or through any street or road." The information was framed under this sub-section, and stated that the appellant "on the 2nd day of April, at Heaton Norris . . . with a view to compel one Samuel Axon to abstain from working as a carter for Messrs. William Loose & Co., Stockport, being

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an act which he, the said Samuel Axon, had a legal right to do, unlawfully, wrongfully, and without legal authority did follow the said Samuel Axon with two or more persons in a disorderly manner in a certain street there called Wellington Road North contrary to the statute in such case made and provided." The summons and commitment were in the same terms. Under s. 9 of the same Act a person accused before a Court of summary jurisdiction may "declare that he objects to being tried *for such offence* by a Court of summary jurisdiction," and the Court of summary jurisdiction may thereupon deal with the case as if the accused were charged with an indictable offence, "and *the offence* may be prosecuted on indictment accordingly." The offences mentioned in s. 7 are therefore primarily only triable summarily, and the accused must object to render them triable by indictment.

In the indictment the words "being an act which the said Samuel Axon had a legal right to do" were omitted from each of the four counts. They are part of the offence, and are therefore necessary words in the indictment. In *McKenzie*, (1892) 2 Q. B. 519; 61 L. J. M. C. 181; 5 R. 10; 67 L. T. 201; 41 W. R. 144; 17 Cox, C. C. 542; 56 J. P. 712, though these words were inserted the nature of the acts were not set out and the conviction was quashed, and Collins J. said: "It is clear that the gist and pith of the offence here is not the following in a disorderly manner, but the doing so with a view to compel the informant to abstain from doing some act which he had a legal right to do." In *Ex parte Wilkins and another*, 18 Cox, C. C. 161; 64 L. J. M. C. 221; 72 L. T. 567; 59 J. P. 294 (1895), where the conviction was upheld, the words missing here were inserted in the commitment.

In the summons the act specified was "working as a carter for Messrs. William Loose & Co."; in the indictment it was "driving two horses and a lorry in and along a certain road in the Township of Heaton Norris known or designated as Wellington Road North whilst working as a carter for Messrs. William Loose & Co." The act alleged has been changed from that on which the appellant was committed.

[RIDLEY J.: You have got particulars.]

There were other counts in the indictment, under sub-s. 3, for

"hindering" Sampel Axon, which was a further departure from the summons.

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[RIDLEY J.: The counts referred to the same conduct, whether it is called "following" or "hindering." But this point is not open to you, as on the record a verdict of "guilty" has only been entered on the first count.]

The indictment was bad because it included this count.

Particulars of the "two or more persons" ought to have been inserted in the indictment; if it was not known who they were they should have been referred to as "persons to the jurors unknown." Particulars of the "disorderly manner" ought also to have been inserted.

The Chairman misdirected the jury by failing to explain the nature of the alleged offences; there was a crowd present, and the Chairman never distinguished between the acts of the appellant and the acts of the crowd. Under the Trade Disputes Act the appellant had a right to "peacefully persuade" the carter.

Brocklehurst for the Crown was not called upon.

RIDLEY J.: It is not possible to contend that there has been anything wrong in this conviction. The conviction was in fact on the first count, and it is so entered on the record; this count is framed on s. 7 of the Conspiracy and Protection of Property Act, 1875. One objection taken is that it ought to have been stated in the indictment that when Samuel Axon was driving two horses and a lorry along a certain road that that was an act which he had a legal right to do or abstain from doing, and *McKenzie* is quoted in support of this contention. In that case, where the defendant was convicted under s. 7, the objection taken was that the conviction stated that he wrongfully and without legal authority followed the informant in a disorderly manner, with two or more other persons, in certain streets, with a view to compel him to abstain from doing acts which he had a legal right to do, but did not state what the acts were. The Court held that that conviction was bad, as it ought to have stated what the acts were which he had a legal right to do. Here the indictment has stated what the informant was doing, but has omitted the

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formal statement that he had a legal right to do it. The argument in *McKenzie* has no application here, and there is nothing in the point raised.

Another objection taken is, that as under s. 9 the right is given to the person accused to be tried on indictment, we must follow the words in the section, which says the accused may "declare that he objects to being tried for such offence by a Court of summary jurisdiction," and thereupon the case is to be dealt with as if it were an indictable offence, and "the offence may be prosecuted on indictment accordingly." Counsel for the appellant says the offence in the indictment is not the same offence because there are three other counts, one of which charged him with "hindering," which was not the offence with which he was charged in the Court of summary jurisdiction, and so was not "the offence." The argument is ingenious, but it is without substance. He was prosecuted for the offence, namely, a particular occurrence which may be called following or hindering. It was something which obstructed Axon, to use a general term. In the circumstances it was treated as the same offence. The summing up did deal carefully with the offence, and with that which is allowed by the Legislature and is known as peaceful persuasion. There is therefore no reason to interfere with the conviction.

Appeal dismissed.

Solicitor for the Appellant—*T. A. Needham*, Manchester.

A. L. B. T.

THOMAS HENRY BLOODWORTH.

The rule as to the corroboration of the evidence of accomplices applies to female witnesses who may be liable to prosecution under the Incest Act, 1908.

Where such corroboration exists, the evidence of such a witness of other incestuous acts between the same parties (not charged in the indictment) is, on the authority of Ball (1911, A. C. 47; 6 Cr. App. R. 31), admissible, but if such evidence is uncorroborated the jury should be warned against it.

This was an appeal against conviction on a point of law. Appellant was convicted of incest, at the Leicester Assizes, on the

7th June, 1913, before Avory J., and was sentenced to eighteen months' imprisonment with hard labour.

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Maddocks for the appellant, who was not present. The offence in this case was alleged to have been committed with his daughter Hetty, a girl of eighteen years of age. In 1911 the appellant and his wife ceased to live together, and Hetty and another daughter, Mabel, went to live with their mother. In August, 1912, Hetty went to keep house for her father, and the first count of the indictment referred to an offence having occurred between the 1st and 31st August. The only evidence on this count was that of Hetty, who said that she slept with her father for a fortnight, and that he had connection with her on three occasions, and that he was drunk and almost incapable at the time. Hetty being herself liable to be prosecuted for the offence must be regarded as an accomplice, and there was no corroboration of her evidence on this count.

The second count had reference to an offence between the 1st and 31st December, 1912; by that time Mabel had also come to live with the appellant, but she and Hetty differed as to the day on which the offence occurred. They agreed that the appellant came in very drunk and said, "You can go to bed and sleep in my bed"; they did so, but when the appellant came up he told Mabel to go to the other room, and she did so. Hetty said that the appellant was so drunk that he never took off his clothes but lay on the bed all night; she stated that he had connection with her, but she made no complaint until March, after she had been thrashed by the appellant and turned out of the house for pawning his clothes. She then was examined by a doctor, who found she was suffering from gonorrhoea; the appellant was examined and found to be suffering from syphilis. This evidence, though immaterial either way, was prejudicial to the appellant. On arrest he made a statement denying the offence, but stating that the girl was said to have a bad disease, that she was over age, and that they could not do anything to him. *Dimes*, 76 J. P. 47; 7 Cr. App. R. 43 (1911), is authority that corroboration is required in such a case, and it is true that the judge did direct the jury to this effect, but if there was any corroboration at all it was so slight that the judge ought to have warned the jury that it was not a case where they could safely convict.

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[RIDLEY J.: Corroboration may be found in the probability of the whole story; see *Thistlewood*, 33 St. Tr. 681 (1820), where Abbott L. C. J. said at p. 921: "I will only say that by the law of this, and I believe of every other country, accomplices are witnesses competent to be heard; the credit that is to be given to them is matter, in this country, for the consideration of gentlemen in your situation; and that credit must depend in a great degree on the probability of the story they tell, or on the confirmation that may be given to them from other and pure sources, so far as what they say is capable of confirmation, and upon the absence of that contradiction which may be adduced if the story related be not true."]

Later cases seem to shew that the jury should be directed to acquit in the absence of corroboration: *Jellyman*, 8 Car. & P. 604 (1838); *Barnard*, 1 Car. & P. 87 (1823).

[RIDLEY J.: Personally I think there are some cases which go too far.]

As to the girl's general credibility, she admitted that she had had connection with another man in November, 1912, and that she had given evidence before the magistrates that she was pregnant by this man, which evidence she had admitted was untrue. She was asked by Mr. McCurdy, who appeared for the Crown, whether she had had connection with the appellant in July, 1910; I objected, but the judge allowed the question on the authority of *Ball*, (1911) A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox, C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. App. R. 31. The evidence in that case was given by independent witnesses; here it was given by the girl herself, and is subject to the same remarks as to corroboration. Further, in *Ball* the evidence was admitted to prove guilty passion; here the man was so drunk that the question of passion did not arise.

The Incest Act makes it an offence for a man to have connection with a person who is to his knowledge his daughter. Having regard to the state of intoxication the man was in, it may well be that, if he had connection with the girl, he was unaware

at the time that she was his daughter; if so, he would not be within the words of the statute.

[LAWRENCE J.: If he was not too drunk to have connection he was not too drunk to know that it was his daughter.]

Irrelevant matters made the case one in which the jury were bound to convict, but they would not have done so but for these irrelevant matters.

McCurdy, for the Crown, was called on as to the admissibility of evidence as to the appellant and his daughter having had connection in 1910. The parties being father and daughter the same presumption would not arise from the fact of their sleeping together as it would if they had not been so related; their conduct was susceptible of an innocent interpretation, and *Ball* is directly in point that the evidence was admissible to shew that that would not be a correct interpretation.

RIDLEY J.: In this case the appellant was convicted of incest at the Leicester Assizes, and two main points have been taken on his behalf. The case of incest alleged was with his daughter, and the occasions were in August and December, 1912. The appellant and his wife lived together until July, 1911, when she left him, and the two daughters went with her. After a time, in August, 1912, the daughter Hetty returned to the appellant, and she alleges that he had connection with her then on three occasions. The other offence alleged was in December, by which time the other daughter, Mabel, had also returned to the house. Hetty was eighteen years of age and so was an accomplice; and therefore it was necessary that her evidence should be corroborated and the jury warned that they ought not to convict without corroboration; and the judge did so warn them. He pointed out that if there was any corroboration it was in the evidence of Mabel as to the events in December; as to August there was no corroboration. He also dealt with the other subjects put forward as corroboration and dismissed them; he said the disorders from which the appellant and his daughter were suffering were not worthy to be considered as corroboration. Then he considered Mabel's evidence; according to her on that night in December her father came home very drunk and told his daughters

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to go and sleep in his room; they did so, but Mabel left the room when her father came up, leaving Hetty and the appellant in bed together. Surely what he put he put very fairly. Is it not correct to say according to the evidence the appellant was in bed with Hetty? It is for the jury to say what is corroboration, but the judge said it was impossible to suggest stronger corroboration than that which Mabel gave, that the appellant was left all night in the room with Hetty. It seems to me that that was no more than fairly put as being powerful corroboration; it was open to the jury to reject it and say that it was capable of an innocent explanation; but they took the opposite view. That being so, we cannot say that on this point the conviction was unsatisfactory. The appellant was called, and the jury had an opportunity of forming an opinion on his story; he was not a witness likely to get any credit with the jury. It was only with some difficulty that he was got to admit the truth of Mabel's story. On this part of the case the Court is clearly of opinion that after conviction by the jury it is impossible to hold that it was unsatisfactory.

The other point taken is that evidence as to July, 1910, ought not to have been admitted. The matter turns on *Ball*, which was quoted at the trial. I do not suggest that the facts are exactly the same. In that case there was no doubt that a brother and sister were occupying the same bedroom, and evidence was given by other people to shew that such occupation was not of an innocent character; there was some evidence that they had had a child. Here the evidence was by the girl herself, but the cases do not differ on this point, that two people were in bed together—(there having the relationship of brother and sister), and the question was whether there was evidence to shew that they were there for sensual purposes, and the evidence in question was held to be material for that purpose. Ivory J. said that if there was corroboration of the fact that the girl was in bed with her father the evidence was relevant to shew whether it was probable that connection took place. In principle this is covered by the decision in *Ball*. But it is fair to observe that when the evidence was admitted it was proper to point out that there was only the evidence of the girl on the point, and the judge said it was true that it was not corroborated by any other evidence, and the jury were warned for that reason not to pay too

much attention to it; the jury were therefore sufficiently cautioned on this point. For these reasons the appeal must be dismissed.

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Appeal dismissed.

A. L. B. T.

Ridley J.

Solicitors for the Appellant—*Sharp and Lancaster*, Loughborough.

AUGUSTUS LEARY.

On an indictment for felonious receiving, the question whether defendant was in possession is for the jury and not for the judge.

This was an appeal against conviction and sentence by leave of the full Court (see above, p. 67). Appellant was convicted of larceny, at the Central Criminal Court, on the 30th May, 1913, before Mr. Commissioner Rentoul, and was sentenced to eighteen months' imprisonment with hard labour.

Fox-Davies for the appellant, who was present. There was no evidence in this case that the appellant was concerned in the actual larceny. The only evidence against him on the count for receiving was that a police constable saw a man with a barrow loaded with boxes containing the stolen goods hurrying down the street. He then stated that he saw the appellant speak to that man and direct him down Clifton Street. Although my principal defence was an *alibi*, I submitted that there was no evidence against the appellant that he was ever in possession of the stolen property, but the judge ruled against me. The prosecution, apart from the *alibi*, had to make out their case and on that case an issue, and the only issue for the jury to try was therefore whether the appellant was in possession of the stolen property. The judge, however, commenced his summing up with these words: "Two men are in possession of a stolen barrow of boots; there is no question of that at all," thus deciding the one point that was a question for the jury.

J. Wylie for the Crown. The first passage in the summing up was qualified by a later passage which suggested that there was

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evidence on which the jury could find that the appellant was in possession of the stolen property.

BRAY J.: In this case the point is taken that the question was not properly left to the jury whether the appellant was in possession of the stolen property. As the jury convicted him of feloniously receiving it, it was essential to shew possession. I think there was some evidence of possession, but the question was for the jury, not for the judge. Unfortunately the judge treated it as a question for him to decide; he said: "Two men are in possession of a stolen barrow of boots; there is no question of that at all," and he then dealt with the question whether the appellant was one of the men. He dealt with the point again later and said: "If you think the officer was not mistaken, knowing this man very well; if this man was with the barrow, and he ran away on seeing the officer, there can be very little doubt that he was with the man who had previously stolen the barrow, and he is in possession." That does not cure the mistake, and we are of opinion that the conviction cannot stand. There is another indictment on which the Court directs the appellant to be tried.

Conviction quashed.

Solicitor for the Appellant—*W. L. Dagg.*

A. L. B. T.

JAMES RALPHS.

Not to prevent carnal knowledge taking place may, in certain conditions, be "causing" or "encouraging" it within s. 17 (2) of the Children Act, 1908. Severity of sentence.

This was an appeal against conviction and sentence by leave of Bankes J. Appellant was convicted, at the Lancaster Assizes, on the 9th June, 1913, before Bailhache J., of causing and encouraging the seduction of a girl under sixteen years of age, of whom he had the custody, care, and charge, and was sentenced to eighteen months' imprisonment with hard labour.

Hans Hamilton for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted under s. 17 of 8 Edw. 7, c. 67, the Children Act, 1908, as amended by

s. 1 of the Children Act (1908) Amendment Act, 1910, which added the words "or unlawful carnal knowledge" to the words "seduction or prostitution" in s. 17. The offence was alleged with regard to the appellant's daughter Rose, whose age was eleven. The appellant's wife had to go to the hospital, and after her departure, Samuel Fisher, who was engaged to an elder daughter, Ruth, came to live at the house. There were two bedrooms in the house; the appellant slept in one, and he knew that Fisher had on several occasions slept in the other with his two daughters. Rose slept against the wall, Ruth next, and Fisher on the outside. Fisher was convicted at the same assizes of having had carnal knowledge of Rose.

The only evidence that the appellant caused or encouraged the offence was that he knew that Fisher and his daughters slept in the same room, and I submit that this is not sufficient, there must be some overt act, or evidence of some definite intention of bringing about the seduction, prostitution, or unlawful carnal knowledge. Merely not preventing it is not sufficient to warrant a conviction under s. 17 (1). Sect. 17 (2) makes this plain, for it sets out the only cases in which a person is "deemed" to have caused or encouraged it. Under that sub-s. a person is deemed to have caused or encouraged the offence "if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character." All the appellant did was to allow his daughter and Fisher to consort, and as there was no evidence that Fisher was a person of known immoral character, this was not sufficient to warrant a conviction. In *Moon*, 1910, 1 K. B. 818; 79 L. J. K. B. 505; 74 J. P. 231; 4 Cr. App. R. 171, Channell J. directed the jury fully as to the meaning of "encouraging," and said, "It seems to me that it means doing something more than merely not preventing. Encouraging seems to me to mean actively doing something." In the present case there was no direction to the jury on the point at all.

[BRAY J.: The judge said, "Did the father cause or encourage that by allowing that state of things to continue, in which, according to Rose, these three persons slept in one bed downstairs?"]

There were many inconsistencies in the girl's evidence which

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the judge failed to point out to the jury. He also failed to draw the jury's attention to the fact that she had made an admittedly false charge of carnal knowledge against another man.

The sentence was too severe; under the section two years' imprisonment is the maximum term that can be imposed.

Barrington Ward, for the Crown, was called upon as to sentence only. The man's own case was that it was owing to the fact that he had given way to drink that Fisher had to sleep with the children.

LAWRENCE J.: The appellant was convicted on an indictment charging him with causing or encouraging the seduction, prostitution, or unlawful carnal knowledge of a girl under sixteen years of age, of whom he had the custody, care, or charge. The case for the Crown was that the appellant was the father of the girl, and that she and her sister slept in a bedroom downstairs, while the father slept upstairs. When the mother went to the hospital, Fisher, who was the lover of the elder girl, came to stay at the house. The father, having control of the house, allowed Fisher to sleep with the two girls, and Fisher is alleged to have had carnal knowledge of the younger girl, whose age was eleven. The question we have to consider is whether the appellant caused or encouraged this. Mr. Hamilton contends that something more active is required than allowing the two to sleep in one bed, which is all that occurred. The Court does not think that more is required. It is difficult to see what more can be done than to allow Fisher to sleep where he did. It is true that the offence was more likely to have occurred with the elder girl, but the fact was likely to encourage it happening with either girl. The judge put it quite fairly in his summing up. With regard to the point that he did not go into the question of the meaning of encouraging in as great detail as was done in *Moon*; it is not necessary to do so in every case; the facts were different in that case; there the two parties and the girl's parents were all sleeping in one barn. To put the two persons to sleep in one bed when there was the power to prevent it is, in the opinion of the Court, ample evidence of encouraging.

It has been argued that there was no direction as to inconsistencies in the evidence. It is sometimes well-nigh impossible to deal with inconsistencies, especially in cases where matters of

habit are in question, and questions are asked which are understood in a different sense to that in which they are put.

The sentence was, in the opinion of the Court, too severe, and must be reduced to one of nine months' imprisonment with hard labour.

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Sentence reduced.

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HERBERT HAMILTON.

Severity of sentence of preventive detention.

This was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted of larceny and of being a habitual criminal, at the County of London Sessions, on the 24th June, 1913, and was sentenced to three years' penal servitude and ten years' preventive detention.

Appellant in person. My age is forty-seven, and a sentence amounting in all to thirteen years is too severe.

Roome for the Crown. This is the first case that I know of where a sentence of ten years' preventive detention has been imposed, but it was a bad case. The appellant was sentenced to five years' penal servitude in 1906 after three previous convictions commencing in 1899, all of which were cases of larceny as a butler. In 1906 he pleaded guilty to three charges of obtaining goods by worthless cheques. On his release from prison in 1910 he committed twenty-four different larcenies in four months, and he was then sentenced to twenty-three months' imprisonment with hard labour, and his licence was revoked. He was released on the 26th March, 1913, and within a fortnight committed a crime, and was guilty of three other larcenies before May. He admitted that he was in work at the time, so he had not the excuse of want. If he reforms he will be released before the ten years have expired, and this was pointed out to him by the Deputy-Chairman in passing sentence.

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RIDLEY J.: The only question in this case is whether the preventive detention to which the appellant was sentenced should remain at ten years or be reduced to five. The appellant has a bad record, and there is no doubt as to the justice of his conviction; he had a long record of fraud, and all except the first were serious cases. Now he is sentenced to three years' penal servitude and ten years' preventive detention. I do not say that other persons have not been sentenced to ten years' preventive detention, but as a rule we impose five years, and there is nothing in this case which makes it much worse than others. The Court reduces the period of preventive detention to five years.

Term of preventive detention reduced.

A. L. B. T.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE AVORY, AND
MR. JUSTICE LUSH.

WILLIAM HARRISON BIRCHALL.

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Mere suspicion of a wife's adultery is not sufficient to reduce a husband's homicide of the suspected person to manslaughter.

The doctrine of Rothwell (12 Cox C. C. 145; 1871) is not to be extended.

This was an appeal against conviction on a question of law. Appellant was convicted of murder, at the Stafford Assizes, on the 7th July, 1913, before Horridge J., and was sentenced to death.

Bosanquet for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was indicted for the murder of his brother on Sunday, the 27th April, and the ground of appeal is that the judge refused to put the defence raised on his behalf to the jury. The appellant was a collier of good character who had formerly been in the army, but since Christmas he had given way to drink. Until a week before the death of his brother they had been on good terms, but he then entertained the belief that his brother had committed adultery with his wife. There was no foundation for this belief, but it arose from a conversation he had with his mother. On the 27th April the appellant, his wife, mother and brother were all at home together and a quarrel arose between the appellant, who had been drinking most of the day, and his wife; the brother intervened and called the appellant a coward. Later in the evening the two brothers were sitting opposite each other in the room, when the appellant challenged the deceased with having had connection with his wife; the latter said, "Will, what is the meaning of this dirty talk?" and the appellant said, "You are guilty or you would face it," and then stabbed him in the neck with a knife.

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The appellant believed that he had received such provocation as would reduce the crime to manslaughter, and the questions which the jury ought to have been asked to consider were whether he had such a belief, and whether, if the facts had been as he believed, they would have justified a verdict of manslaughter. The act and the intent must both occur to constitute a crime: *Fowler v. Padget*, 7 T. R. 509; 4 R. R. 511 (1798); though there was *mens rea* of a kind here, it must be looked at to see whether it was such as would reduce the crime to manslaughter. The state of a man's mind owing to drunkenness may properly be taken into consideration by the jury: *Gamlén*, 1 F. & F. (1858). In *Tolson*, 23 Q. B. D. 168; 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716; 16 Cox, C. C. 629; 54 J. P. 4 (1889), it was held that a *bond fide* belief on reasonable grounds that a husband was dead was a good defence on a charge of bigamy, and the authorities on the subject were examined by Hawkins J. in his judgment; they shew that it is necessary to prove that the act was done feloniously. In murder there must be the intention to kill with malice aforethought; the malice is lacking here.

[BRAY J.: There was no justification for the appellant killing his brother even if what he believed had been true.]

In *Rothwell*, 12 Cox, C. C. 145 (1871), the jury were told they could find manslaughter where a husband, suddenly hearing from his wife that she had committed adultery, killed her. This case is similar. In any case the point ought to have been left to the jury, but the judge told them it was no defence.

Cranstoun and *Snagge* for the Crown were not called upon.

BRAY J.: The appellant in this case was convicted of murder, and Mr. Bosanquet on his behalf says that the conviction was wrong on the ground that the judge misdirected the jury. No doubt he did direct the jury that what happened immediately before the act could not reduce the crime from murder to manslaughter. If Mr. Bosanquet could convince us that he was wrong in doing so he would have gone a long way toward sustaining this appeal. We must consider what the facts were. The appellant was charged with the murder of his brother, and there was

some evidence of the vaguest character of a conversation between him and his mother on the Saturday night from which he is said to have entertained the belief that his brother had been guilty of misconduct with his wife. On the Sunday the appellant came home; he and his wife were living with his mother and the deceased. There was a quarrel between the appellant and his wife in which he hit her, and the deceased intervened to this extent only that he called the appellant a coward. The wife went away, and after some interval of time the appellant, in the presence of Mrs. Oakes, said that the deceased "had been in his wife." The deceased said, "Will, what is the meaning of this dirty talk? what is the meaning of it? I don't care for this dirty talk." The appellant said, "You are guilty or you would face it;" the deceased answered, "The girl would have done if you had not driven her out with the knife;" the appellant then jumped up from his chair saying "You or me for it," and stabbed his brother in the neck.

Mr. Bosanquet does not put his point quite as it is put in the cases where the prisoner makes a discovery of adultery on the part of his wife immediately before committing the act. He says that the appellant had an idea in his mind that the deceased had committed adultery with his wife, or a suspicion to that effect, and that that prevented there being any *mens rea*. But it is not the want of a *mens rea* that reduces the crime in such cases from murder to manslaughter. It is the provocation. As Blackburn J. said in *R. v. Rothwell*, the question is whether the words "would amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did." In that case it was held that words spoken by a wife, which amounted to a confession of adultery, were sufficient provocation, but that was an extreme case, and there is no case that goes further. In the opinion of the Court there should be no extension of the doctrine there laid down. Here there were no words spoken by the deceased to put the appellant in a passion, and no confession of adultery with his wife. It may be that there was not a complete denial, but there was nothing to justify an ordinary man striking the deceased as the appellant did. That is the only ground on which the crime could be reduced to manslaughter, not because there was no *mens rea*, but because the conduct of the deceased preceding the act was such as to throw the appellant into such a

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violent temper that he was not fully responsible for the act. Can it be said that there was anything of the sort here? Assume that the appellant had this idea, does that justify him in stabbing his brother in the neck? If so, every petitioner could kill the co-respondent without being guilty of murder. Such a doctrine has never been laid down. The judge, therefore, was perfectly justified in telling the jury here that the acts preceding the crime would not reduce it to manslaughter. The judge did leave to the jury the question as to the state of the appellant's mind owing to drink, but the jury considered that this did not justify them in returning a verdict of manslaughter. Mr. Bosanquet does not complain of that. The direction to the jury was quite right, and the appeal must therefore be dismissed.

Appeal dismissed.

A. L. B. T.

JOHN HINTON BAILEY AND HARRY THOMAS UNDERWOOD.

On a charge of conspiracy it is misdirection to discuss the case of each defendant separately without reference to the alleged concert.

These were appeals against conviction by leave of Bankes J. Appellants were convicted of conspiracy to cheat and defraud, at the Central Criminal Court, on the 10th June, 1913, before Mr. Commissioner Rentoul, and were each sentenced to three months' imprisonment in the second division.

George Elliott, K.C. (with him *Curtis Bennett*), for the appellants, who had been granted bail and were present. I propose to direct myself principally to Bailey's case, because, in my submission, his case is quite clear, and as the charge is one of conspiracy, if his conviction is quashed, that of Underwood cannot stand. The indictment did contain a charge of conspiring with persons to the jurors unknown, but there was no evidence and no suggestion on the part of the prosecution to support this.

Underwood was for many years a partner in a firm of hay and forage contractors, known as Underwood Son & Company, Limited. The relations between him and the other directors became strained

owing to matters arising out of army contracts in the South African war, and on the 1st January, 1911, he resigned, having entered into a covenant not to engage in any business competing with that company. He then became a director of a picture palace syndicate, called the Pantheon Syndicate. It came to his knowledge that some of his old employes, among whom was Bailey, were in danger of losing their employment with Underwood Son & Company, Limited, so he suggested that he should try and find the money to enable them to start a business of a similar character. His wife raised £200, and on the 1st February, 1911, a private company was started, the capital being two thousand £1 shares and the directors Bailey and Underwood's daughter Violet; another daughter was the third signatory. The memorandum and articles of association provided that £500 per annum should be divided between the two directors, and it was also arranged that Miss Underwood, who was an experienced clerk, should receive a salary of 25s. weekly. Bailey was to draw £3 weekly on account of his directors' fees. By February, 1912, Bailey had drawn £128 18s. 4d. on account of expenses in addition to the £3 weekly; Miss Underwood only had drawn her salary from February to August, 1911, and £70 for directors' fees, so at that time there was due to her £31 10s. for salary and £180 for directors' fees.

Before that, in January, Bailey and Underwood had had an interview at which Bailey had said that further capital was required, and Underwood said he would raise £200 through a friend. Underwood raised £200 from a moneylender, and he went to a friend of his named Hawkins, who was unknown to Bailey, and asked him to be trustee for his daughter in respect of a debenture of £300. A resolution creating this debenture was passed by the two directors on the 17th February. Hawkins agreed to be trustee if his solicitor arranged the matter, and it was all right. Underwood received the £200 from the moneylender in notes, which he paid into the account of the Pantheon Syndicate, of which Hawkins was also a shareholder. He then drew a cheque for the same amount, which he handed to Hawkins in an envelope, and told Bailey to call on Hawkins and he would get the money; he led Bailey to believe that Hawkins was the lender. Bailey called on Hawkins,

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received the envelope, which he opened, and found the cheque which was paid into the account of Bailey and Underwood on the 20th February. The lending was done in this way because Underwood did not wish to appear as the lender for fear of being charged with a breach of his covenant with his former company. Hawkins received the debenture for £300 as trustee for Miss Underwood. At the time the cheque was paid into the account there was a cheque outstanding payable to one Wells for £118, which could not have been met but for this payment.

Shortly afterwards Underwood called at the firm's office and saw the ledger, which happened to be lying open; he then learnt for the first time that Bailey had drawn £128 for expenses, and as he knew the firm owed his daughter money he was much annoyed. There was a stormy interview between the appellants, and it was then and there arranged that Miss Underwood should be paid the £211 10s. due to her. It was arranged that Miss Underwood's claim should be met by a payment of £210, and it was discharged as follows. Cheques were drawn payable to Lyons for £78 10s. on the 27th February and to Blair for £100 on the 4th March; these two men were creditors of Underwood's, who were paid out of the money due to his daughter by arrangement between them, and he repaid her by giving her shares in the Cardiff Hippodrome; two other cheques for £20 and £11 10s. were drawn to Miss Underwood in respect of arrears of salary. Cousins, the bookkeeper, entered all these amounts against Hawkins' account, except that the cheque to Blair was entered as £90 instead of £100; and the balance of £10 was entered as having been paid to Miss Underwood. This shews that Bailey believed that Hawkins had lent the money. In April the company went into voluntary liquidation, and Underwood told Hawkins that he must put in a receiver for the debenture-holder; he put in Howison, who entered into possession. After the liquidation Underwood received £200 and repaid the moneylender. The case for the prosecution was that the object of the whole transaction was to enable Underwood to pay in £200, which was immediately paid out to him, while the debenture remained in force and enabled him to get a further £200 in the liquidation, thus def auding the creditors. The case for the defence was that the only object was to conceal the fact that Underwood was the real lender of the £200. In any case there was no evidence to connect Bailey

with any fraud; all he did was to fetch the cheque from Hawkins and he was a party to paying the four cheques out. He never drew another penny from the company after the debenture was created, so, being a creditor, if he was guilty of depleting the assets of the company, he did so to his own disadvantage. The account shews other payments in to the credit of the firm towards the end of February, so it is not true to say that the £200 was used to repay Miss Underwood.

The summing up was unsatisfactory, for the judge, though dealing fully with the case against Underwood, hardly touched upon the case against Bailey, but left the jury to believe that if Underwood was not believed they could convict both prisoners. It contained a reference to Underwood's firm having been struck off the list of Government contractors; this was Underwood Son & Company, Limited, not Underwood and Bailey; that company, though struck off the Government list, obtained £2,000 damages from the *Daily Chronicle* in an action for libel. The judge told the jury that the £200 was not used for paying creditors or for helping on the business at all; this was not correct; he also said that Bailey went on drawing £3 weekly, whereas the evidence was that he drew nothing at all after the issue of the debenture. He told the jury that if Underwood's explanation was not satisfactory they had no option but to convict him, entirely losing sight of the question of conspiracy. My submission is that there was not even a case to go to the jury as regards Bailey, and that therefore neither conviction can stand.

Comyns Carr (with him *R. Oliver*) for the Crown. Mr. Elliott has put his case as if the evidence of the appellants were all established facts; the probability is that the jury did not believe it. The case for the prosecution was that it was all concocted for the purpose of explaining the facts. No submission was made at the trial that there was no evidence to go to the jury as regards Bailey; the suggestion is made for the first time to-day. The case for the prosecution was based mainly on the documents. Mr. Gladwell, an accountant, prepared a statement of the company's affairs as on the 17th February, 1912, which shewed debts amounting to £1,175 2s. 9d., and assets shewing a deficit of £259 7s. 11d., but this was without making any allowance for bad debts, which he estimated would increase the deficiency by about £600. The case for the Crown was that the directors knew the company could

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not last much longer, that the £200 was paid in by a devious route to conceal from the creditors the fact that it was Underwood's money, and almost at once paid out to him, while the debenture for £300 remained in force. On the 20th February the balance at the bank was £109, and on the next two days, in addition to the £200, £98 was paid in, so that the £200 was not required to meet the cheque to Wells of £118. No substantial payments out to creditors were made unless Miss Underwood was one, but we say she was not. Under the articles of association the directors' remuneration was to be £500 to be divided between them according to a resolution passed, or an agreement in writing. No such resolution was passed or agreement come to. The jury evidently did not accept the view that any money was due to Miss Underwood; the only way of keeping the company alive was for the directors to make no claim for fees, and there was nothing to shew that any such claim was made. I put it to the jury that the whole transaction was Underwood's and that Bailey acted on his instructions; the fact that he did not profit himself is not proof that he was not a party to the fraud. The whole matter was a question for the jury, they heard the evidence and the speeches on both sides, and the matter was so clearly before them that no summing up was really required. In these circumstances the Court should not interfere.

LUSH J.: The appellants in this case were charged with having on the 1st January, 1912, and on divers subsequent days unlawfully conspired to cheat and defraud persons who were or who might thereafter become creditors of Underwood and Bailey, Limited, and with having unlawfully deprived them of their moneys. There was also a count in the indictment charging them with conspiring with persons unknown, but if there was a conspiracy at all admittedly only the two appellants were concerned in it. The summing up of the judge shewed that the only case was against these two. The facts are a little involved. Underwood was originally connected with Underwood Son & Company, Limited; there was friction with other members of the firm, and he had resigned. He then came under restrictive covenants as to carrying on the business. He wanted to assist Bailey and his daughter and supplied money for Underwood and Bailey, Limited, out of Mrs. Underwood's monies; the two directors were Miss Underwood and Bailey. Now Underwood and Bailey were

in debt and in need of funds and resolved to borrow £200. Underwood provided it by a somewhat devious route to this company; he makes Hawkins the nominal lender and the debenture is in his name; the cheque is handed to Hawkins and so got to the company. There is no evidence to shew that Bailey knew about this. Most of that sum was used to pay debts, and about two or three weeks later nearly £200 got back to Underwood, though the debenture still existed. What happened was that two cheques were drawn in favour of Lyons and of Blair, respectively creditors of Underwood. The remainder was paid as wages to Miss Underwood. What was then the position of the company to these persons? She was to have £3 a week and £250 as director's fees, of which she got a little; Bailey got a good part of his £250 fees. Underwood finds this out and insists that his daughter should get more of her fees, and hence the cheques to her. Then a receiver is put in for the debenture-holders, voluntary liquidation follows, and the amount of the debenture is discharged as if it was valid. But by all this Bailey had nothing to gain—the reverse was the case. It is not necessary for the Court to say whether there was no evidence at all against Bailey, for the case of the prosecution was not properly presented to the jury; we need only refer to one or two passages, viz., "What does affect the case and what does affect the case only is, how this money was procured and what was done with it, and what was the object of getting this money and how was it intended to be dealt with, so that it comes down to that small point." "The prosecution alleges that the directors knowing the company was insolvent created a debenture to secure themselves, if there should be anything remaining in the way of assets at all, and to prevent the creditors getting any share of these assets, however small. . . . So that the whole transaction seems to be one that requires a great deal of explanation." Then the learned judge discusses the case of each of them separately—a misleading direction, as it entirely omits the question of conspiracy. The real question was not left to the jury at all, and on that ground alone the conviction must be quashed. It is extremely doubtful whether there is any evidence at all against Bailey, and if there is none against him there can be none of conspiracy against Underwood.

Conviction quashed.

Solicitor for the Appellants—*E. D. K. Busby.*

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Murder.

A judge is entitled to make an independent suggestion on the facts not made by the prosecution or the defence.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 5th July, 1913, at the Manchester Assizes, before Bailhache J., and was sentenced to death.

F. B. Merriman for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The wife of the appellant was murdered by having her throat cut with a razor on the 15th May between 5.30 and 11.45 a.m., and the only question at the trial was whether the appellant committed the crime. The appellant was a man who was addicted to drink, which had led to his two sons turning him out of the house, but a day or two before the murder he returned home. On the 13th May he found a postcard addressed to his wife, which rendered him suspicious, when drunk; this led to quarrels, and on the following day the sons told him he must leave the house if he did not cease quarrelling. On the 15th May the sons left the house, according to the evidence for the prosecution, at 5.20 a.m., and at 5.30 a knocker-up saw the woman alive. At 7.0 a neighbour heard a movement in the room where the body was ultimately found; this was the room in which the appellant and his two sons had slept. This must have been the deceased, because the prosecution also proved that the appellant was in the St. Andrew's Arms at that time; in fact, the jury were directed that they must assume that the movements were caused by the deceased. At 8.55, according to two women called by the prosecution, the appellant was seen coming out of the house, but other evidence called for the prosecution shewed that he was drinking at the Cricketers' Arms between 8.30 and 9.0, and nearer 8.30; and the defence proved that the distance from there to his house was 1,437 yards. At 2.0 p.m. a doctor saw the woman's dead body, and said in evidence that he thought she had been dead at least six hours; *rigor mortis* had set in, and that generally occurred about six hours after death. At 9.50 the prosecution proved that the appellant was again in the Cricketers' Arms and was too drunk to be served; the landlord said it was

manifest that he had spent most of the interval since his first visit in drinking. No attempt was made by the prosecution to prove distances.

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The case for the defence was that the appellant left the house at 6.0 a.m. and never returned, and that from before 7.0 onwards he was at various public-houses; we also proved the various distances. Before 7.0 the appellant was at the Mitre, which was 300 yards from the house; this was the only point as to which his evidence was not corroborated; also before 7.0 he was at the Crown and Anchor, 740 yards from the house; and shortly afterwards at the St. Andrew's Arms, 1,010 yards away; he left about 7.0. Then a little before 7.30 he was at the Rodney, 1,300 yards from the house, where he had two drinks. About 7.55 he was in the Mitchell Arms, 1,307 yards in distance, and remained there with the exception of two short intervals of some five minutes each until 9.15, when he went out for about half an hour, and went to a shop kept by Mr. and Mrs. Dove, two irreproachable witnesses, and to the Cricketers' Arms as proved by the Crown; the shop was 1,500 yards from the house. Then the Crown had proved that he was again in the Cricketers' Arms at 9.50, having had more drink since he left it.

The judge in his summing up dealt only with the evidence for the defence on this point, and suggested that the murder might have been committed at 9.15, as there was time for him to return home from the Cricketers' Arms between about 9.0 and 9.50. This entirely left out of sight the suggestion made by the Crown that the murder was committed before 8.55, and the evidence of the doctor that at 2.0 the woman had been dead for quite six hours; it also left out of sight the evidence that the appellant was proved by the Crown to have been in the Cricketers' Arms between 8.30 and 9.0, and must have spent much time in drinking between then and 9.50. This omission amounted to misdirection; the real question for the jury was whether they accepted the evidence that he was in the Mitchell Arms between 7.55 and 9.15, but they were misled as to the important issues.

[AVORY J.: There was at least twenty-five minutes between the times he was in the St. Andrew's Arms and the Rodney in which he could have committed the murder.]

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He would have had to go 1,010 yards home and 1,300 yards back as well as committing the murder, and the evidence was that he was quite cool and collected when he arrived at the Rodney.

The only other evidence to which I ought to refer is an alleged confession by the appellant to a man named Smyth; it is true that the nature of the confession was of a somewhat remarkable character, but Smyth was a man who had been convicted some twenty-two times, and the judge told the jury not to pay any attention to his evidence unless it was in line with the probabilities of the case. Although it was alleged that the appellant went on his knees in the corner of a public street at a time when the street was full, and the fact was widely reported at the time in the local press, no one came to corroborate his evidence. Then a further point was made on the demeanour of the appellant when charged; all he said was, "What, me! I know nothing about it," although his case was he did not know till then that his wife was dead, but he naturally addressed himself to the charge of murder against himself. He was quite drunk when arrested at 2.30, and must have been still muddled when charged at 6.15. He was asked to account for his movements and refused to, but later he gave the inspector full details, and he had all the witnesses for the defence in Court at the second hearing before the magistrates. On the other hand, although two arteries were severed and the wall was splashed with blood, no bloodstains were found on the appellant's clothes. The conviction therefore should be quashed.

H. S. Q. Henriques and *P. M. Oliver* for the Crown were not called upon.

BRAY J.: This is an application for leave to appeal against a conviction for murder, and of course our duty is to look most carefully at the evidence, although we have no right to interfere with the verdict of the jury unless it be on the ground that greater care must be exercised in a case of murder than in other cases. The case for the defence has been put most clearly by Mr. Merri-man, and we must look first of all generally at the case, going into the outlines of the case in order that we may see if there was anything in the summing up that was not quite fair. Up to October last there had been differences between the appellant and

his wife when the former got drunk, and in consequence of these quarrels the sons said that they and their mother would move to a different address. About the 8th or 9th May the appellant came to live with them again, and one or two circumstances of some importance occurred before the 15th May, the day of the murder. There was the incident of the postcard addressed to the deceased, which contained just something which might induce a man inclined to be quarrelsome to think that she was guilty of improper conduct. It is obvious that he was angry and was not satisfied with her assurance; on the next day he was drunk and referred to it again. The sons said "Shut up! or you shan't remain here."

On the 15th May the woman was murdered between 7.0 and 10.0 a.m. The doctor who saw the body at 2.0 thought she had been dead about six hours. Without going into every question of times it is clear that the appellant was quarrelsome when drunk, and there was plenty of evidence for the prosecution and the defence that he was drunk on that morning. The woman was murdered with a razor belonging to her son, which was kept in a cupboard. It is not every stranger who would know where it was kept, and there was apparently no motive for a stranger going to the house. That is, as the judge said, a strong case of suspicion against the appellant. There was also the evidence of Smyth. It is true he had been convicted many times, but his evidence was of a remarkable character and such as it is unlikely such a man could have invented. He said that the appellant went on his knees at the corner of the street, crossed himself, and confessed to the murder.

Then there was the demeanour of the appellant when charged. He did not, according to his story, know that his wife was dead, but all he said when charged was, "What, me! I know nothing about it." Then he was asked to account for his movements and refused; it is true that afterwards he gave an account, but he would know by then that his only chance of escaping the charge was to give an account of his movements which was as far as possible consistent with the evidence for the prosecution.

That seems a strong case against him, but the case for the defence was that his movements were such that he could not have been at the house at the time of the murder. He proved where he was between 7.0 and 11.0 a.m., but one knows the value of evidence to support an *alibi* that a man was at particular times at

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particular public-houses. We do not know when the witnesses were asked about it, and it would be very difficult to remember the exact times even a week afterwards. The jury would consider the case and the strong circumstances to which I have referred, and whether the case for the Crown was shaken by the evidence of an *alibi*. So dealing with the question whether the conviction was unsatisfactory it is impossible to say so. We should probably have come to the same conclusion, and we have a report from the judge who tried the case that he is satisfied with the verdict.

The appeal is based on another ground, namely, misdirection, and it is urged that the facts were not put fairly and truly by the judge to the jury. There are cases where the Court has set aside a verdict on the ground that the facts were not put fairly and truly to the jury, but the Court has said time after time that it will not allow the omission of a word to support an appeal; there must be something substantial. Mr. Merriman relies on the suggestion made by the judge as to the time at which the murder was committed, but it was put merely as a suggestion, and the judge first dealt fairly with the evidence of the doctor that the woman had been dead about six hours, so that the murder would have occurred not later than 9.0. Then he proceeded to deal with the evidence in support of the *alibi* and that of the prosecution, and then referred to what opportunities, according to the appellant's story, he had of committing the murder; he was merely commenting on the evidence. To say that we must set aside the verdict because we do not agree with every word of the summing up is impossible. He dealt with the evidence of the appellant and of Smyth, and as regards Smyth he did not press it too hardly against the appellant. The whole summing up has been read, and we feel bound to say that there is nothing in it calculated to mislead the jury. The judge has a right to express an opinion. It is impossible for us to say that the verdict was unsatisfactory, or that there was anything in the way of misdirection or omission which would justify us in saying that the jury was misled.

Application dismissed.

A. L. B. T.

FRANK GREENING.

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The law as to provocation sufficient to reduce homicide to manslaughter is not the same in the case of unmarried as of married persons.

 Bray J.
 Avory J.
 Lush J.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 14th July, 1913, at the Birmingham Assizes, before Atkin J., and was sentenced to death.

R. A. Willes for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted for the murder of Elizabeth Davies, a woman with whom he had been living as his wife since February. The case for the prosecution was that he had on two previous occasions treated her with violence, and on Sunday, the 6th April, after Davies had complained to a Mrs. West of one of these acts, he was said to have threatened her; later on that day he shot her at the house of a Mrs. Mumford, the daughter of Mrs. West; these women kept a house of ill-fame and the appellant objected to Davies going there. There were also frequent quarrels between them owing to the fact that Davies was addicted to drink. The defence was that the sudden discovery of the deceased, a woman who was practically his wife, in this house and in a state of intoxication was sufficient provocation to reduce the crime to manslaughter; the judge laid down as a matter of law that there was no evidence before the jury which would "justify" the conduct of the appellant. The use of the word "justify" was calculated to mislead the jury, but it appears frequently in the summing up.

Although the doctrine that the sudden discovery of adultery as constituting provocation on which a jury may return a verdict of manslaughter is generally applied to cases where the person is the prisoner's wife, *Palmer*, [1913] 2 K. B. 29; 82 L. J. K. B. 531; 29 T. L. R. 349; 8 Cr. App. R. 207, suggests that it can be extended to the case of a mistress; Channell J., in giving the judgment of the Court, said: "But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in the position of being engaged to be married." It is a strong thing to say that a visit to a registry

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Bray J.
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office, possibly years before, can alter the condition of a man's mind. The judge's direction was wrong because it treated the question as though certain circumstances would amount to manslaughter and others would not; it was for the jury to ascertain the state of the appellant's mind from the facts proved. *Hayward*, 6 Car. & P. 157 (1833).

The appellant went to the house with a loaded revolver; he explained that he took it to return it to its owner, but no reference was made to his explanation in the summing up. The appellant gave evidence and in cross-examination said what was the provocation he received.

Costello (with him *Sir Ryland Adkins*) for the Crown was not called upon.

BRAY J.: In this case the appellant was convicted of murder, and the ground of his appeal is that the judge misdirected the jury in telling them that there had been no provocation which would justify them in reducing the crime from murder to manslaughter. He told them that, if it was proved that the appellant took the life of the deceased, the onus of proving that it was manslaughter was on him; that no provocation by word or gesture (there may be a doubt as to gesture, but it is not in question here) could amount to such provocation as would reduce the crime to manslaughter. Objection has been taken to the words "A man is not entitled" to kill, but there is no question as to how the jury would interpret the word when dealing with a case where manslaughter was the defence put forward. There is no doubt that the judge gave a clear direction that there was no such provocation as would reduce the crime to manslaughter, and if he was wrong in law the conviction could not be upheld. But there is clear authority that in a case of supposed provocation a judge ought to tell the jury what amount of provocation would entitle them to return a verdict of manslaughter, and, if there is no such evidence, to tell them so.

The cause alleged is the sudden discovery of the deceased by the appellant in Mumford's house, which I will assume was a disreputable house. I do not consider whether there was any evidence to support the suggestion, but assuming there was, is it sufficient? The law on the subject has been laid down by

Channell J. in *Palmer*, and in dealing with that case he said: "But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife." It is these last words which give a loophole to the argument addressed to us to-day. Channell J. does not say that it does apply in such cases, but he leaves it open. In the opinion of the Court the law on that point does not apply to the case of two persons living together though not married. It is a grave offence against the husband for the wife to commit adultery, but there is no such offence when a man is living with another woman. He has no right to object to her going to a house of ill-fame; the case is entirely different. That is sufficient for the purposes of this case, but assuming that every word the appellant said was true, it does not amount to anything like the sudden discovery of adultery, or that she was even about to have connection with another man. The judge was bound to tell the jury, as he did tell them, that there was no justification in law for reducing the crime to manslaughter. The appeal must therefore be dismissed.

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FRANK
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Bray J.

Appeal dismissed.

A. L. B. T.

HUGH McLAREN.

Murder.

The Court will not, as a rule, entertain a defence of insanity not set up at the trial.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 18th July, 1913, at the Swansea Assizes, before Lord Coleridge J., and was sentenced to death.

Ernest Evans for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The solicitor who instructed me at the trial has written a letter with reference to the state of the appellant's mind, which letter is, I understand, before the Court. I apply for an adjournment to enable me to see whether

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if it would be right for me to ask leave to call further evidence. The question was not raised at the trial.

LUSH J.: The Court will deal with this point first. The appellant in this case was convicted of murder. An application has been made by counsel for an adjournment in these circumstances. A communication has been made quite recently, and shewn to the Court, which makes it possible that if an investigation was made into the state of his mind, it might be found that he was insane and not responsible for his actions at the time of the offence. No doubt under s. 5 of the Criminal Appeal Act the Court has jurisdiction to investigate that question. But at the trial no defence on the ground of insanity was raised; the case proceeded on the assumption that if he committed the offence he was guilty. The question is whether we ought to accede to the request, and I refer to what the Lord Chief Justice said in *Lumb's* case (7 Cr. App. R. 263; 1912), that in ordinary circumstances the Home Secretary, whose powers are expressly reserved by the Act, is in a better position to investigate these matters than the Court. The Court is of opinion that in this case there are no circumstances which make it expedient that we should grant this application. We think the Court ought to follow the course adopted in *Lumb's* case, and on this ground we refuse it.

Application refused.

Evans. The deceased was standing with two other men in Roath Dock, Cardiff, when the appellant approached and made a remark which led to words between them, and according to the evidence for the prosecution he got hold of the deceased by his collar with his left hand and plunged a knife into his side. The defence raised was that the verdict ought to be manslaughter. If the evidence of the three witnesses is examined it is clear that a complete story of what happened was not before the jury, and if they considered the probabilities they would be bound to find that the killing was not premeditated, but arose out of a quarrel. The summing up did not put this defence fairly to the jury, and the judge said that I asked the jury to invent facts which were not justified by the evidence. It is true I called no evidence, but the evidence for the Crown supported my case.

Ivor Bowen, K.C., and *Clement Edwards* for the Crown were not called upon.

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LUSH J.: The appellant was convicted of murder, and there was evidence before the jury which, if it was accepted, established the following circumstances. The deceased was in company with one or two others in the docks at Cardiff on Easter Sunday, when the appellant went up to him and said something about making tea; he pulled out a packet of tea, and an altercation ensued, which is said to have lasted some ten seconds. The appellant then seized the deceased by the throat with his left hand, stabbed him with his right hand, and walked away. The appellant on arrest said, "I have nothing to say. I will kill a dozen Dagoes like that."

At the trial Mr. Evans took the line he has indicated to-day, namely, that if the jury accepted the evidence for the prosecution the appellant must have meditated the crime; but it was clear he did not, so it was evident that something had happened which the jury had not heard of, and which resulted in a fight; if so, he received such provocation as would reduce the crime to manslaughter. This defence had not been suggested before, and if there had been provocation, it would have been easy to prove it by calling the appellant; this was not done. It was so plain a case that counsel had to formulate an ingenious defence which the jury did not accept. No misdirection is suggested, so the appeal fails.

Application dismissed.

A. L. B. T.

MARY ELIZABETH BENTLEY.

It is not a misdirection to make a suggestion as to the facts of a case different to that made by the prosecution and by the defence.

This was an application for leave to appeal against conviction. Appellant was convicted of murder at the Leeds Assizes, on the 16th July, 1913, before Mr. Commissioner English Harrison, and was sentenced to death.

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Charles Mellor for the appellant, who was not present. The facts in this case shewed that the appellant had spent a life of thirty years' ill-usage and misery. At the time of crime she was cohabiting with a man named Thomas Ratcliffe, and seems to have got on with him fairly well when they were sober, but they were both addicted to drink; she had on a former occasion had a bone in her head broken, which affected her when in drink. On the day in question the appellant was drunk, but Ratcliffe fairly sober; there was a quarrel and he threatened to take his daughter away. This child had been brought to the house at the request of the appellant, and she was devoted to her. She said, "Don't wake her; you know I would not injure her"; there was a fight, in which the appellant was thrown violently to the ground. On the next morning at 5.0 a.m. she was apparently sober, but in a curious state of mind, and she told people they would see something curious in the papers. By midday she was hopelessly drunk, and the child was found strangled with a piece of shirting.

The defence raised was that a drunken person may be seized with a sudden desire to do an act of violence and have no power to resist it, and that the proper verdict would be one of manslaughter. The appellant had also on that night tried to set fire to another house and to injure another child. The case for the prosecution, as opened by counsel, was that the child was killed between 10.0 p.m. and 5.0 a.m. The Commissioner suggested that it might have been done between 5.0 a.m. and midday, at which time the appellant was sober, and the defence therefore failed. The jury made a strong recommendation to mercy, and if they had not been so directed would probably have found manslaughter.

Bruce Williamson and *A. H. Marshall* for the Crown were not called upon.

AVORY J.: In this case the only question which the Court has to decide is whether there was any misdirection on fact of the jury who, with all the circumstances before them, and everything that could be said by Mr. Mellor on behalf of the appellant, found themselves constrained to find her guilty of murder; this was after a direction which, as far as the law was concerned, is not complained of. The defence raised was that the verdict should be one of manslaughter on the ground of the

drunken condition of the appellant at the time of the offence. It has been laid down that if an accused person was so drunk that he could not have contemplated the natural consequences of his act he may be found guilty of the lesser offence. That was the proposition put before the jury by Mr. Mellor. He says that to support it he had to invite the jury to find that the killing took place between 11.0 p.m. and 5.0 a.m. The evidence was that at 11.0 she was the worse for drink, and at 5.0 she was out of doors and sober. He complains that the Commissioner suggested that the crime might have occurred after 5.0 a.m. when she was sober. It is clear that, looking at the evidence, he was right in saying that it might. There was no direct evidence to shew whether it was before or after. The jury had both views put before them; the prosecution originally suggested that it occurred between 11.0 and 5.0; Mr. Mellor also made the same suggestion; the Commissioner merely suggested that on the evidence it might have been after 5.0. The jury had to determine between these views, and were directed that they might take the drunkenness of the appellant into consideration if they came to the conclusion that she was so drunk at the time that she was not capable of forming any definite purpose at all. The Commissioner concluded his summing up with the direction that if they found that such was the case they might return a verdict of manslaughter. The jury, having all the circumstances of her unhappy life and habits of drunkenness before them, convicted her of murder. The only thing that this Court is called on to say is that there was evidence on which they could so find, and in the opinion of the Court it was the proper verdict. The appeal therefore must be dismissed.

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Application dismissed.

Solicitors for the Appellant—*Neill and Dawson*, Bradford.

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Bray J.
Avory J.
Lush J.

THOMAS SYKES.

Severity of sentence.

This was an appeal against conviction, by leave of the full Court. Appellant was convicted of manslaughter, at the Liverpool Assizes, on the 13th June, 1913, before Bailhache J., and was sentenced to three years' penal servitude.

The facts were that the appellant became incensed with the driver of a taxicab, who refused to drive a person, who had been seriously injured in an accident, to the hospital. After threatening to put the man's eye out the appellant thrust at his face with an umbrella, which pierced his eye and entered his brain. The application for leave to appeal came before the Court, consisting of Ridley, Bray, and Lawrence JJ., on the 14th July, when leave was refused on the ground that no breach of principle was involved, although the sentence was heavier than the members of the Court would have themselves imposed. During the adjournment Ridley J. consulted Bailhache J., who stated that he wished the sentence to be reduced. Leave to appeal was accordingly given.

Appellant, who was not present, was not represented by counsel.

B. Thompson for the Crown.

BRAY J.: In all the circumstances of the case the Court considers that a sentence of twelve months' imprisonment without hard labour will be enough.

Sentence reduced.

A. L. B. T.

MORRIS FERGUSON.

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On an indictment for obtaining money by false pretences, it is essential that the jury should understand that there should be no conviction without an intent to defraud, and unless such intent is clear from the facts, they should be directed on the point; they should also be directed that the obtaining must be due to the false pretence alleged.

• Bray J.
Avory J.
Lush J.

This was an appeal against conviction and sentence, by leave of Bankes J. Appellant was convicted of obtaining money by false pretences, at the Cheshire Sessions, holden at Knutsford, on the 2nd July, 1913, and was sentenced to eighteen months' imprisonment with hard labour.

O. F. Dowson for the appellant, who was present. The first count of the indictment in this case charged the appellant with having on the 15th April, 1913, falsely pretended to one Thomas Burgess that he, his sister, and a friend intended to start an artist's business in Knutsford, that if the said Thomas Burgess would let him have a photo he was prepared to make him an enlargement of it *gratis* for an advertisement, that he was prepared to bring a copy along with the photograph of the said Thomas Burgess then produced when he brought it back, and that if it suited he might give him the chance of framing it, whereby he obtained two shillings and sixpence from Burgess; in this count there was no allegation of an existing fact suggested against the appellant, and consequently nothing that would support the charge of obtaining money by false pretences.

The second count alleged that the appellant on the 19th April represented to Mrs. Burgess that he was a photographic enlarger carrying on a genuine business, that the picture he then produced to her was a good and genuine enlargement of the photograph of her husband and was of the value of one guinea, that the frame of the said photograph was made of rosewood and was of the value of one guinea, and that she could not get it done in Manchester for the same price, and that he obtained thereby from Mrs. Burgess eighteen shillings and sixpence.

There was no evidence that Mrs. Burgess was induced by any false pretences to part with her money. There was a statement by Burgess to appellant that he would have no frame that was

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not of solid rosewood, but he admitted in cross-examination that he knew the sample he saw was not of solid rosewood. Both he and his wife said that the reason why they paid the money was that they were afraid that the appellant would take legal proceedings. The Chairman misdirected the jury; in the first place he was wrong as to the sum obtained, and, further, he led the jury to think that a certain statement by appellant to the effect that he was connected with a large firm in Manchester was one of the false pretences they had to consider, although no such false pretence was alleged in the indictment. Then he told the jury false pretence must have three elements in it; it must be false as to an existing fact; it must be false; and the person who parts with the money must do so believing the false pretence to be true. They were not told that it was necessary for them to find an intent to defraud before they could convict. (He was stopped by the Court.)

Trevor Lloyd for the Crown. The jury would have inferred from the general trend of the case that it was necessary for them to find an intent to defraud before convicting. The whole case was conducted on those lines. The Chairman referred to the evidence that the appellant said he represented a large firm in Manchester; although there was no specific allegation to this effect in the indictment it was covered by the allegation that he was carrying on a genuine business. It is true there was evidence that he was doing some business, but evidence of a small business is no answer to a pretence that he carried on a large business; *Cooper*, 2 Q. B. D. 510; 46 L. J. M. C. 219; 36 L. T. 671; 25 W. R. 696; 13 Cox C. C. 617 (1877); C. C. R.

It was no answer to say that Mrs. Burgess parted with her money on account of the appellant's threats if she was induced by the false pretences as well.

AVORY J.: It is sufficient for the purpose of our judgment in this case to say that it was essentially necessary that the jury, if they were directed on the law at all, should be told that a most important element in the case was an intent to defraud. The Chairman told the jury that the offence contained three elements; the statement made must be false as to an existing fact; it must be false in fact; and the party who parts with his money must do

so believing the pretence to be true. The last is not strictly accurate, and might lead the jury to think that, if he was induced to part with his money by some other circumstance while believing the pretence true, they ought to convict the prisoner. But the Chairman omitted to tell them of the fourth, and here the most important element, the intent to defraud. He concluded his summing up with these words: "If you come to the conclusion that these people parted with their money believing these statements and the statements were as to existing fact, and these statements were false, you will be justified in finding the prisoner guilty. If you do not believe such then you will find him innocent." Undoubtedly that direction withdrew from the consideration of the jury the question whether there was an intent to defraud. We do not say that in every summing up on a charge of false pretences which does not draw attention to this question there is necessarily a misdirection. There are cases where it is impossible that the money could be obtained unless there was an intent to defraud; it may be inferred from the circumstances of the case. But this case is not one of them. The first count in the indictment was clearly bad, and it might have been objected to on the ground that it disclosed no false pretence; the second contained the allegation of a false pretence as to the frame being made of rosewood. Evidence was given on behalf of the defence by persons in the trade that such frames were known as rosewood when made of imitation rosewood. The appellant's case was that he was entitled to call it a rosewood frame, so it was necessary for the jury to determine whether there had been an intent to defraud. It is also doubtful whether the woman was induced to part with her money by the statement, or whether she was not rather induced to do so by the threat of proceedings in the County Court. In the circumstances it was essential that the jury should be properly directed, so the Court can only say that there was a misdirection which may have led to a miscarriage of justice, and therefore the conviction cannot stand.

Conviction quashed.

Solicitor for the Appellant—*H. W. Osborne*, agent for *T. H. Hinchcliffe*, Manchester.

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SAMUEL EDWARD CLARKE.

Bray J.
Avory J.
Lush J.

Severity of sentence.

Consecutive sentences should be imposed sparingly.

This was an appeal against sentence, by leave of Bankes J. Appellant was convicted on two charges of larceny and one of obtaining goods by false pretences, at the Peterborough Sessions, on the 3rd July, 1913, and was sentenced to ten years', five years', and five years' penal servitude respectively, the sentences to run consecutively.

Appellant in person. The sentence is practically a sentence of penal servitude for life. It was four and a-half years since my last conviction.

S. E. Pocock for the Crown. There were twenty-seven warrants out against the appellant in addition to the three charges on which he was convicted, and he asked that these should be taken into consideration. There were four previous convictions against him, but one of these was on four charges. A detective-inspector of the Metropolitan police stated that since his last release from prison he had seduced and robbed two young women. There is a question whether the Chairman had power to order these three sentences to run consecutively. Under s. 12 of the Prevention of Crime Act, 1908, the Home Secretary has power, if he thinks it right, to commute penal servitude (for five years or more) after three years served to preventive detention if it appears to him that appellant has been a habitual criminal.

LUSH J.: We think that the sentence in this case was unduly severe; such a sentence must be reserved for cases even worse than the present. The conclusion the Court has come to is that the sentence must be altered in this way; the sentence of ten years' penal servitude must remain, but the other two terms of five years' penal servitude must be made to run concurrently with it. Under s. 12 the Home Secretary undoubtedly has power to alter part of it to preventive detention, but that is a matter solely for the discretion of the Home Secretary.

Sentences reduced.

A. L. B. T.

JAMES HENRY SMITH.

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29 July.*Severity of sentence.**The Court will correct a sentence passed under a misapprehension of its effects.*Bray J.
Avory J.
Lush J.

This was an appeal against sentence, by leave of Bankes J. Appellant was convicted of burglary, at the Middlesex Sessions, on the 15th June, 1913, and was sentenced to two years' imprisonment and recommended for the modified Borstal system.

Appellant in person.

J. Ratcliffe Cousins for the Crown. The appellant pleaded guilty to breaking into the house of his former employer and stealing food. He was not sent to a Borstal Institution because he was reported as being medically unfit, and the question arises whether it was proper to sentence him to a period under the modified Borstal system, which would be excessive as ordinary imprisonment. Rules have been drawn up under the Prisons Act, 1898, by which differential treatment is accorded to all prisoners between the ages of sixteen and twenty-one who are sentenced to over one month's imprisonment; this is known as the modified Borstal system; those whose sentences are under three months remain in the prison of commitment, the others being aggregated at special prisons. They receive treatment which approximates as closely to that given at a Borstal Institution as the facilities of the particular prison allowed. But whereas under the Borstal system there is power to release the prisoner on licence at any time after he has served six months, there is no such power under the modified Borstal system, and he is not even entitled as of right to the one-sixth remission which can be earned by good conduct in the case of ordinary prisoners; it is in the discretion of the prison committee. While it has been laid down in *Kirkpatrick*, 73 J. P. 29; 25 T. L. R. 66; 1 Cr. App. R. 170 (1908), that it is right to pass an extended sentence on a youth sent to a Borstal Institution, there has been no such decision with regard to the modified Borstal system. As the appellant's age is sixteen he would have received this treatment in any case, so the direction of the Chairman has no effect.

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JAMES HENRY
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Bray J.
Avory J.
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Mr. M. L. Waller, one of the Prison Commissioners, gave evidence bearing out counsel's statement. He stated that endeavours were made to find employment on discharge under this system equally as on discharge from a Borstal Institution.

On the 30th July the appellant's father gave evidence and stated that he would endeavour to get his son work on a farm on his discharge

BRAY J.: The Chairman of the Middlesex Sessions sent the appellant, a boy of sixteen years of age, to two years' imprisonment under the modified Borstal system. We learn from the report that he has made to us that he did so in the belief that the Home Secretary could allow him out on licence before the end of this period. That is a mistake; the possibilities as to his being discharged before the end of the period are slightly less favourable than in the case of adults sentenced to an ordinary term of imprisonment with hard labour. In these circumstances, the sentence having been passed under a misapprehension, we can say what we consider is the proper sentence. We have had the modified Borstal system explained to us, and we learn that all juvenile adults sentenced to over one month's imprisonment receive this treatment. The addition of the words "modified Borstal" in the sentence are therefore of no effect; he will be given the treatment in any case simply because he is a juvenile adult. We have to award such a sentence as we think proper; it is well not to give a short sentence in this case, but it ought not to be a long sentence. We think the proper sentence is one of four months running from the date of conviction, and we bear in mind that the father of the appellant is prepared to exercise suitable supervision and to find him employment on his discharge.

Sentence reduced.

A. L. B. T.

WILLIAM THOMAS SAUNDERS.

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29 July.*Severity of sentence.*Bray J.
Avory J.
Lush J.

This was an appeal against sentence, by leave of Bankes J. Appellant was convicted of attempted suicide, at the Essex Sessions, on the 3rd July, 1913, and was sentenced to six months' imprisonment in the second division.

Austin Jones for the appellant, who was present. The appellant has an excellent character; he was employed by the Post Office, who are willing to continue to employ him. He was invalided owing to neurasthenia in January, and received his salary until July, when it ceased owing to his arrest. He is a married man with children.

[BRAY J.: We understand that the Chairman sent the appellant to prison in the interests of his health. He received a medical report that the appellant's health had much improved since he came to the prison, but that he was not yet fit to be released, as, if he were, he might make another attempt on his life.]

In that case may he be put in the first division, where he will have greater facilities for seeing his wife?

Roland Burrows for the Crown.

BRAY J.: We will alter the imprisonment to the first division and report to the Home Secretary that, in our opinion, he should be released as soon as the doctor reports that it is safe to do so.

Sentence varied.

Solicitors for the Appellant—*Williams and James*.

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CHARLES STURGESS.

Bray J.
Avory J.
Lush J.

On a charge of larceny, when the facts are compatible with an honest mistake on the defendant's part, there must be a direction on intent to steal.

Where defendant has sold some of the goods alleged to be stolen by him, it may be necessary to direct the jury whether he intended to account to the owners for the proceeds.

This was an appeal against conviction on points of law. Appellant was convicted of larceny, at the Northampton County Sessions, on the 3rd July, 1913, and was sentenced to six weeks' imprisonment in the second division.

Sir Ryland Adkins for the appellant, who had been granted bail and was present. The vicar and churchwardens of Potterspury Church entered into a contract with the firm of Sturgess & Sons, for whom the appellant acted as foreman, for certain repairs to the roof of the church. Under the contract the firm were to take the old lead in part payment at £13 : 10s. per ton, and the practice was to take the lead from time to time to a barn in the village, where it was weighed by the surveyor acting for the vicar and churchwardens. On the 22nd May a local policeman saw some lead concealed under some ivy in the churchyard; he accordingly kept watch, and a few days later the appellant was seen to remove the lead; some he took to a shed, and some to the barn where the lead was weighed. On the 29th May he was taking this lead from the barn to their nearest depôt of the firm, which was at Wolverton, in one of their carts, when he was arrested; when pressed as to whether it had been weighed he said it would be at Wolverton. Part of the charge was in respect of a smaller amount which he had sold on the previous day at £14 per ton to a man named Goodman. This sale was, I submit, on behalf of his firm; Goodman paid him £1 on account, and there was no evidence whether or not he had accounted to the firm for this sum.

The summing up contained no direction on the question whether there was any intent to steal, nor as to whether the lead was the property of the vicar and churchwardens, in whom it was laid, or of Sturgess & Sons. The Chairman said: "I cannot see that the defendant or *Sir Ryland* have given any explanation of the circumstances"; this cast on the appellant the onus of proving himself

innocent. He also said, "I cannot find one fact in the prisoner's favour"; this was usurping the functions of the jury. (He was stopped by the Court.)

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W. A. Metcalfe for the Crown. The lead in the cart must have been stolen, and the appellant was found in possession; he gave contradictory accounts as to whether it had been weighed or not. The property only passed when weighed, and therefore it still belonged to the vicar and churchwardens, the prosecutors. I cannot justify the Chairman's direction casting the onus of proof on the appellant.

AVORY J.: In this case it is sufficient to say that no proper direction was given to the jury. The circumstances were peculiar; it was not the ordinary case of a man being charged with going on the premises of another person and taking property which he must have known was not his. This was a case in which the appellant might have been making an honest mistake in taking the lead, although some of it had not been weighed. There were many considerations which might have justified the jury in saying that there had been no felonious intent, and it was necessary for the jury to find whether the appellant intended to account for the lead to Sturgess & Sons, which might have negatived felonious intent. This question was never left to the jury; on the contrary, they were told that unless an explanation was given they must convict. The conviction must therefore be quashed.

Conviction quashed.

Solicitor for the Appellant—*C. J. Allinson*, Northampton.

A. L. B. T.

ERNEST BROCKLESS.

Severity of sentence.

This was an appeal against sentence, by leave of the full Court. Appellant pleaded guilty to a common assault, at the East Riding Sessions, on the 1st July, 1913, and was sentenced to six months' imprisonment with hard labour.

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Brooks for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was charged with an indecent assault and a common assault; he pleaded not guilty to the former but guilty to the latter charge, and this plea was accepted. His age is sixteen. The bench was probably influenced by the charge of indecency; they did not hear his witnesses to character, which, till this offence, was good.

Rowan Hamilton for the Crown. The assault was committed on a girl of eight years, and he was found by the child's father standing over her as she lay on the ground, her clothes being disarranged. The Bench suggested that the plea to a common assault should be accepted in order that the girl should not have to give evidence. For this a sentence of twelve months' imprisonment with hard labour could have been passed; the Chairman with all the facts before him thought six months a proper sentence.

LUSH J.: If this appellant had pleaded guilty to, or been convicted of, an indecent assault, the case would stand on a different footing. What happened was that he pleaded guilty to a common assault, and this plea was accepted. The sentence passed could, in the opinion of the Court, only be justified if he had pleaded guilty to an indecent assault, and we have to deal with it on the footing that he was guilty of a common assault, and not an indecent assault. In our opinion the appellant has been sufficiently punished for this, and the order of the Court is that he be immediately discharged.

Sentence reduced.

A. L. B. T.

31 July.

CHARLES HANNAY.

Severity of sentence.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of housebreaking, at the Middlesex Sessions, on the 7th July, 1913, and was ordered to be detained for three years in a Borstal Institution.

Cassels for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant pleaded guilty to four indictments for housebreaking. When arrested on one charge he confessed to six others, and gave information to the police which enabled them to recover a good deal of the stolen property. But for his confession it would never have been known that he was guilty of more than one offence. The burglaries were committed between January and June; until January his character was good. He has been apprenticed to motor engineering, so having already learnt a trade, it is not such a suitable case for a Borstal Institution as that of a lad who has never learnt any trade. His age is nearly twenty-one.

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Purcell for the Crown. There is one other matter which the Court ought to know. While the Chairman was considering what sentence to pass a document was handed up to him, from which he seemed to draw the inference that the appellant had committed five or six further cases beyond the seven referred to. It is clear that the total number was seven, but it appeared to me that the Chairman altered his mind as to the sentence after seeing this document.

AVORY J.: We have given this case careful consideration. At first sight it did appear that the sentence was severe to pass on a lad of twenty who had hitherto borne an excellent character; but it now appears that he had been engaged for three months or more in housebreaking offences, and had been fortunate to escape detection before. The Court must look at the case in the light that he would probably, if he had not then been detected, have gone on until he was. We must consider what is a proper sentence in these circumstances. It is suggested that he should go to an ordinary prison; we agree with the view that the Chairman took that it was not a case in which he could bind over the prisoner, having regard to the number of offences committed by him. In our view detention in a Borstal Institution is the most appropriate punishment; he can be released at any time after six months if the authorities think proper. We are not impressed by the argument that it will be a misfortune for him to learn another trade. But in order to suggest that in our opinion it is a case for release

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at rather an earlier stage than usual, we reduce the period of his detention to two years, leaving it to the authorities to determine whether he should be released earlier.

Sentence reduced.

A. L. B. T.

RAY WILSON *alias* WHITTINGDALE.

If the Court considers that the defendant's case was not fully put to the jury, it may quash a conviction.

Evidence obtained in answer to leading questions may invalidate a conviction.

This was an appeal against conviction, by leave of the full Court. Appellant was convicted of obtaining money by false pretences, at the Somerset Sessions, on the 2nd July, 1913, and was sentenced by the learned Chairman, Sir Edward Fry, to six months' imprisonment with hard labour.

H. Atkins for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment in this case alleged that the appellant on the 10th June, 1913, did falsely pretend to a Mrs. Vincent that he was the representative of and canvasser for a *bonâ fide*, genuine, and then existing advertising business, and that the advertisement book of such business was the Holiday Health Resort Guide, and that such book had a large circulation, and was then ready to receive and publish advertisements, whereby he obtained from Mrs. Vincent two guineas with intent to defraud. The evidence was that the appellant called on Mrs. Vincent on the 10th June, shewed her a copy of the Holiday Health Resort Guide for 1912, and said he was getting out a similar book for 1913, which would contain a special reference to Minehead, where she lived. She agreed to take one-third of a page for an advertisement, and he gave her a receipt as follows: "Received from Mrs. Vincent the sum of £2 : 2s. for insertion of advertisement as above. Per Ray Wilson for the Guides Publishing Co." The receipt bore an address in Birmingham, and a detective gave evidence that no company could be found carrying on business in Birmingham under that name. There was no allegation in the indictment

that he said he represented the Guides Publishing or any other company; and there was no evidence that appellant was not the representative of a genuine and then existing advertising business.

The appellant in evidence stated that he never mentioned the name of the company, and that Mrs. Vincent got its name from the receipt. He said that he had a friend in Birmingham named Marson, who said he was bringing out the Guide, and arranged with him to canvass for advertisements on a commission basis; he said he had no reason to doubt Marson's good faith. The appeal is based on the following grounds: (1) There was no evidence of any false pretence; (2) The defence was not sufficiently left to the jury; (3) There was no direction as to the pretence charged in the indictment. The evidence is difficult to follow, but two of the most important pieces of evidence were elicited by leading questions to Mrs. Vincent, viz.: Did he say it was an existing publication? Did he say he was acting as their agent? (He was stopped by the Court.)

C. T. Carr for the Crown. Marson had already been tried and acquitted, so the evidence given was mainly a repetition; this explains the form of the two questions referred to, which was no doubt unfortunate. Mrs. Vincent had already deposed that appellant said the book had been brought out in previous years, and, therefore, the first question was a mere paraphrase of evidence already elicited, and the alleged pretence of agency was already established by the evidence of the receipt. But both before and apart from these two questions (which merely amplified preceding answers) there was sufficient evidence of various false pretences. The indictment raised in general terms the question whether the matter was a swindle; it alleged that the appellant professed to be the representative of a *bonâ fide*, genuine, and then existing business. The jury heard appellant and Marson describe their business and disbelieved them.

LUSH J.: The appellant was convicted on an indictment which charged him with obtaining money by false pretences. The false pretences alleged in the indictment were that the appellant was the representative of and canvasser for a *bonâ fide*, genuine, and then existing advertising business, and that the advertisement book of such business was the Holiday Health Resort Guide. At the

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close of the case for the prosecution, Mrs. Vincent having deposed to the interview between the appellant and herself, the Chairman said to Mr. Carr, "I must ask you to make your charge a little clearer." Mr. Carr replied, "I put the case of obtaining highest. Before Mrs. Vincent subscribed she said she was told there was a company called the Guides Publishing Company. You will see that the cheque is made out to the Guides Publishing Company, and I have it in evidence from the detective-sergeant that there is no such company. I submit there is sufficient evidence that he represented no such company." The Chairman then said, "That is the only point." Referring again to the indictment it is to be observed that the name of the Guides Publishing Company is not to be found there. Thereupon another witness, a publisher, was called, and said he had employed Marson as a canvasser; he was cross-examined and said he had never dealt with the appellant. It was then submitted that there was no case to go to the jury, and the Chairman, who had said that the only point was whether the appellant professed to represent the Guides Publishing Company and whether that company existed, said there was a case. Then the appellant gave evidence. His case was that he had met a man named Marson who had spoken of his Guide, and he had asked Marson if he could employ him; that an arrangement was come to between them that he should receive 50 per cent. commission on advertisements obtained by him and was to act as Marson's agent; and that Marson adopted the name of the Guides Publishing Company.

1 On that evidence the Chairman summed up. Before I refer to the summing up I would point out that the two important statements made by Mrs. Vincent as to the representations made, were made in answer to leading questions; it is easy to understand why the questions were so put, but that does not make the answers to them evidence. In these circumstances it was very necessary, in the opinion of the Court, that the indictment should have been read, the false pretences alleged pointed out, and the jury asked whether it had been proved that the representations had been made as alleged, whether they were false in fact, and made with intent to defraud, and whether they were acted on by Mrs. Vincent. This was not done; the real case that the appellant made out was not put to them, and the Court has come to the conclusion on the whole that the conviction was not satisfactory, and that it

ought to be quashed. There are other indictments on which he can be tried, but no order will be made as to these. The matter is left for the prosecution to decide, and the appellant will now be discharged.

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Conviction quashed.

A. L. B. T.

GEORGE GREEN.

On an indictment for obtaining credit by fraud, it is not enough to prove that as the result of a fraud money was obtained, it must be proved that credit was obtained.

This was an appeal against conviction, by leave of the full Court. Appellant was convicted of obtaining credit by fraud, at the Warwick Assizes, on the 8th July, 1913, before Darling J., and was sentenced to eighteen months' imprisonment with hard labour.

H. Cloudesley for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was indicted for obtaining £22 by false pretences from a man called Wimbush on the 28th January, 1913, and for obtaining £26 by false pretences from Godsell on the 8th February. There were also counts for obtaining credit by fraud in incurring a debt or liability. The judge held there was no case to go to the jury on the charge of false pretences, and the appellant was convicted of obtaining credit by fraud, as to which, I submit, there was no evidence. (He was stopped by the Court.)

Comyns Carr for the Crown. The case turns on the exhibits. The evidence shewed that the appellant advertised in a Coventry paper that he had mares to sell, and Godsell entered into a contract with him to buy a brown mare in foal for £26, but if it did not fulfil the conditions specified it could be returned in a month and the appellant was to refund the money. Four days later Godsell wrote that the mare was unsatisfactory, and if the appellant returned the £26 he would put her on the rail on Monday next. The appellant telegraphed "Send horse on at once, customer waiting," so Godsell sent the mare but never received the money.

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In the other case the method adopted was similar; the horse was returned by Wimbush and the appellant gave him a receipt in the following terms, "Returned to George Green one horse which is not satisfactory according to agreement; George Green promises to return £22 cash in seven days from date"; but the money was never paid.

Credit was obtained when the purchasers were persuaded to return the horses without waiting for the money. In Wimbush's case it is clear credit was obtained, because an extension of time in which to pay was given; *Peters*, 16 Q. B. D. 636; 55 L. J. M. C. 173; 54 L. T. 545; 34 W. R. 399; 16 Cox C. C. 36; 50 J. P. 631 (1886); C. C. R.

As to fraud the judge said there was fraud from the beginning, but the full working out of the scheme only occurred when it was wished to return the horse. The scheme was to sell a horse which it was known would be unsatisfactory, but with no intention of refunding the money when the horse was returned. Credit was obtained and a debt incurred when the horse was recovered without the money being refunded. The judge in withdrawing the charge of false pretences from the jury, on the ground that it was mere puffing, was no doubt influenced by *Keighley*, 7 Cox C. C. 217; *Dears. & B.* 145 (1856). The mere fact that there was no intention to pay is enough to establish that credit was obtained by fraud; *Jones*, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; 19 Cox C. C. 87; 77 L. T. 503; 46 W. R. 191; C. C. R. It is clear that the appellant never intended to pay, for he left the neighbourhood, and was arrested at Oxford where he denied his name. The last words of the summing up put the case quite clearly: "If you come to the conclusion that he did not pay the money and became a debtor—that is to say, Wimbush and Godsell became creditors—and he obtained money from them by fraud—then you will say he is guilty."

[LUSH J.: The fraud was perpetrated before the seven days' credit was given by Wimbush, so the credit was not obtained by it.]

It was a continuing fraud.

[LUSH J.: He obtained the horse, not credit.]

That is answered by *Peters* (above) and *Juby*, 16 Cox C. C. 160; 55 L. T. 788; 35 W. R. 168; 51 J. P. 310; (1886); C. C. R. He may have obtained both the horse and credit.

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BRAY J.: I regret that we must quash this conviction. I think the jury must have found that the warranty that the horse was sound and a good worker was clearly fraudulent on the part of the appellant, and if so, the £22 was obtained by fraud, but unfortunately the learned judge withdrew this count from the consideration of the jury, and the jury convicted the appellant only on the counts which charged him with in incurring a debt or liability obtaining credit by fraud. It is not true to say that in the transaction of sale the appellant obtained credit, and the counsel for the Crown perceiving this difficulty argued that he had obtained credit by fraud and incurred a debt or liability when he received the horse back and promised to return the cash in seven days. Of this we think there was no evidence. Taking Wimbush's case, which was the strongest, Wimbush did not in his evidence complain of any fraud in relation to the return of the horse. He stated in cross-examination, and quite truly, that he returned the horse (not in consequence of any representation or fraud of the appellant, but) because under the agreement of sale he had the right to do so. We must be careful not to be too subtle in a criminal case. What took place after Wimbush had discovered that the horse did not answer the warranty was not a fresh transaction or a fresh fraud or incurring a fresh debt, it was only the voluntary exercise by Wimbush of his right to return the horse, which, by virtue of the original agreement of sale, made the appellant a debtor to him of £22. This did not in our opinion make the appellant guilty of the crime of which he was convicted.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE DARLING,
AND MR. JUSTICE BRAY.

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STEPHEN SHARMAN *alias* HENRY SUTHERLAND.

The Court has a discretion in granting an adjournment on the ground of one of its members having been the judge at the trial.

This was an application for leave to appeal against sentence. Appellant was convicted of wounding with intent to do grievous bodily harm, at the Central Criminal Court, on the 24th July, 1913, before Ridley J., and was sentenced to fourteen years' penal servitude.

Turreil for the appellant, who was not present. I ask for an adjournment on the ground that the judge who tried the case is a member of the Court (*a*). Though I have no personal objection to his Lordship sitting, the appellant would feel better satisfied if he was not a member of the Court.

DARLING J.: I think this application ought not to be granted. After the assizes, appeals come from all parts of the country; and if appellants are to be allowed to select the judges who shall hear their appeals, the business of the Court could not be carried on. Before the days of the Judicature Act, when the Courts of Queen's Bench, Common Pleas and Exchequer sat in Court to hear appeals (of course, not criminal appeals), it was the usual practice for the judge who tried the case to be present.

(*a*) In the preceding case (*Bennett and Newton*, tried by Ridley, J.) the Court granted an adjournment, no reason being stated, and the Crown not objecting.

The application for an adjournment was refused, and after argument, leave to appeal against sentence was also refused.

Application dismissed.

Solicitor for the Appellant—A. W. M. Colson.

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A. L. B. T.

THOMAS CONNOR.

Severity of sentence.

As a rule penal servitude should not be inflicted after previous convictions unless the offence has been committed soon after release from prison.

This was an appeal against sentence by leave of the full Court. Appellant was convicted of larceny, at the Wiltshire Sessions, on the 1st July, 1913, and was sentenced to three years' penal servitude.

Appellant, who was not present, was not represented by counsel.

Comyns Carr for the Crown. The appellant pleaded guilty to stealing a pair of trousers of the value of eight shillings and six-pence. He had been out of prison since September, 1912, but before that, had a bad record since 1889, and had on three occasions previously been sentenced to three years' penal servitude.

RIDLEY J.: The Court found it necessary in this case to pass a sentence of three years' penal servitude. The appellant pleaded guilty to the theft of a pair of trousers. It is a case which presents some difficulties in dealing with it; there are in such cases two courses open to the Court: one is to proceed to extremities and pass a sentence of penal servitude for a trifling offence, because it is a repeated offence; but that should only be done where the offence is committed immediately after release from prison. The other course is to treat it as a light offence, though not as a first offence, and to avoid passing an excessive sentence. The appellant had been convicted many times before, but a considerable period

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had elapsed since his release from prison after his last conviction. In these circumstances the Court thinks it proper to reduce the sentence to one of six months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

GEORGE STEVENS.

On a count for common assault the jury should be directed that consent is a good defence.

Severity of sentence.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted of a common assault, at the Somerset Sessions, on the 2nd July, 1913, and was sentenced to six months' imprisonment with hard labour.

E. H. C. Wethered for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted on two charges of indecent assault on small children, with the usual counts for common assault. On the first indictment he was acquitted, after giving evidence which was practically an admission of the offence. A new jury was then empanelled, and he was tried on the second indictment; the case was opened as one of indecent assault only, so the jury were told by the Chairman that consent was immaterial. While they were considering their verdict, the Chairman told the jury that there were the two counts in the indictment, and that they could therefore find the appellant guilty of either an indecent or a common assault. This was a misdirection, because consent would be a defence to the latter charge, whereas the jury had been told that they need not consider that question. The jury said that the question was whether the appellant meant any harm, and the Chairman answered: "Intention does not come in." This was also a misdirection, for there must be a *mens rea*. The jury then found the appellant guilty of a common assault only, and in the circumstances this verdict cannot stand.

Further, this case rested mainly on the evidence of the child, who was not sworn, and therefore corroboration "by some other material evidence in support thereof implicating the accused" was required by s. 30 of the Children Act, 1908. I do not say there was no corroboration, but the Chairman misdirected the jury by referring to a complaint made by the child as corroboration; this was not "some other evidence"; moreover, a complaint is not evidence of the facts narrated.

The sentence was excessive, for the Chairman ignored the acquittal on the charge of indecent assault, and in passing sentence, addressed the appellant as "a man of a beastly and dirty mind."

Comyns Carr for the Crown (who was called upon as to the direction with regard to consent only). The direction was not strictly accurate, but there can have been no miscarriage of justice; the girl's age was only seven years, and no jury could have found consent by a girl of this age, in the sense that she knew what she was consenting to. In *Nichol*, Russ. & R. 130 (1807), a jury found there had been no consent in such circumstances, although the girl in that case was thirteen years of age. The jury probably took a lenient view on account of the appellant's age.

RIDLEY J.: This is an appeal against conviction and sentence, and in the opinion of the Court both must be dismissed. The jury found a verdict which it is difficult to construe, but which, we think, means that they did not want to convict the appellant of an indecent assault on account of his age, and, possibly, of the effect it might have on his old age pension, to which he would become entitled before long. They really meant to signify that he was guilty of an indecent assault, but wished him to be dealt with mercifully. To allow him to remain at large would be a miscarriage of justice. Several points have been taken by counsel, but none can succeed. There was evidence to corroborate that of the girl, namely, the evidence of the mother. We do not know why the Chairman said that the statement made to her by the girl could not be put before the jury, but she did say that the girl was crying; if that is not enough to satisfy the statute, there was the conduct of the appellant when accused of the offence; we think, therefore, that the conviction must remain. As to the sentence, he is an old man of sixty-five, but it is monstrous to

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suggest that he had a right to go about the country treating little children in this way. It is open to question whether the sentence was enough.

Appeal dismissed.

A. L. B. T.

ALBERT NEWMAN.

*In a simple case the judge is entitled to ask the jury whether they will dispense with his summing up.
Sentence ought not to be increased because defendant after conviction persists in asserting his innocence.*

This was an appeal against conviction and sentence by leave of Bucknill J. Appellant was convicted of larceny, at the Swansea Assizes on the 15th July, 1913, before Lord Coleridge J., and was sentenced to six months' imprisonment with hard labour.

Thesiger for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant is a fisherman, aged fifty-one, who has never been convicted before, and who was given a good character by the police after conviction. He was indicted for stealing a boat, but though a general verdict was returned, the conviction was more probably for feloniously receiving it. The evidence for the prosecution was that the boat had been made fast to the stern of a ship in Barry Dock, and was missed on the 6th March, 1913. Nothing was heard of the boat until the middle of May, when it was found to be in the possession of appellant. My first submission is that there was really no evidence that the boat was stolen; it may well have got loose and been found either by appellant or by someone else; in any case, this was a point which required the careful consideration of the jury. The judge, however, after stopping the cross-examination of appellant, said to the jury: "Would you like me to sum up, or is the evidence sufficient for you?" The jury naturally convicted appellant, and could hardly have taken any other course without disrespect for the judge. It is true that appellant gave different accounts how he became possessed of the boat, but he explained that he told one story when trying to sell the boat in the hope of

getting a better price for it; when questioned by the police, he gave what he still says is the true account, that it was given him by a man named Chappell. He was corroborated in this by a young son, whose evidence differs from appellant in certain details, a fact which shews that he had not been coached by appellant. The jury should have been told that they must first decide whether the boat had been stolen, and if it had been, whether they accepted appellant's explanation of how he became possessed of it. Had they been so directed they would probably have acquitted appellant, and almost certainly if they had known that he bore a good character.

On being called upon after conviction, appellant protested his innocence; and the judge said: "Are you going to brazen it out? Because I tell you it will make some difference in my course." Appellant repeated that he was not guilty, and the judge said: "If you had expressed contrition and had said you were very sorry, I should not have imprisoned you, because it is your first offence, and I have had a good character of you, and I think it would be one of those cases in which you might have been tempted to steal, and then it might not have been repeated. You have brazened it out and told a lie in the last minute, one of very many, and that shews me that you are not repentant, and you must be punished"; he then sentenced appellant to six months' imprisonment with hard labour. While it may be right to treat an unrepentant thief differently to one who is repentant, the difference between six months and binding appellant over is excessive. He receives a sentence of six months practically for repeating, when not on oath, what he had just sworn to.

Gaskell for the Crown.

RIDLEY J.: The jury in this case returned a general verdict, but we may take it that they convicted appellant of receiving the boat knowing that it was stolen; in some sense this is in his favour. The boat belonged to a ship called *La Fontaine*, and was stolen in Barry Dock; there was evidence that after some time it was found in the possession of appellant; there was also evidence that he first said that the boat had been given to him two years before; then, that a captain had left it behind and had written to him and told him that he could have it; and, lastly,

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Ridley J.

that it had been given to him soon after Easter by a man named Chappell. These stories were inconsistent, and there was also the fact that the name of the boat had been painted out. When the case for the prosecution was over, appellant gave evidence, and after he had been cross-examined for a time, the judge said to counsel for the Crown: "Do you think you need cross-examine any further?" Counsel assented, and then the judge said to the jury: "Would you like me to sum up in this case, or is the evidence sufficient for you?" It was a very plain case, and it cannot be said to have contained any complication that made it necessary to point out the law to the jury; everybody knows what stealing is, and what is receiving with guilty knowledge. The application of the law was simple enough; the case turned on the facts. The jury found appellant guilty, and said they did not want to hear any more; they could not have found otherwise if the case had been summed up to them. The appeal against conviction therefore fails.

As to sentence, the Court feels it is not right to give a heavier sentence to a prisoner because he brazens it out. It was appellant's first offence, but it was not a slight offence; what he stole was part of the equipment of a ship; he endeavoured to avoid detection by giving various accounts of how he got possession of the boat, and there is some reason for thinking that he got his son to corroborate his untrue statement. In the opinion of the Court the proper sentence would be one of three months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

GEORGE BAKER.

When corroboration of prosecutor's evidence is very weak and, after conviction, doubt has been thrown on that evidence, the Court may quash the conviction.

This was an appeal against conviction on the certificate of Mr. Commissioner Rentoul, who tried the case. Appellant was convicted of an indecent assault, at the Central Criminal Court, on the 26th June, 1913, and was sentenced to twelve months' imprisonment with hard labour.

Stanley R. Crawford for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The certificate was granted in this case because since the conviction the same prosecutor, a boy, has charged another man with a similar offence in very similar circumstances. That charge was heard by the Lord Mayor, on the 9th. July, who said that he disbelieved the evidence of the prosecutor, and asked him if he had ever brought a charge of this nature against anyone before. On hearing that he had done so, and that it had resulted in the conviction of the appellant, the Lord Mayor sent the papers to Mr. Commissioner Rentoul. (He was stopped by the Court.)

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Adrian Clark for the Crown. The jury convicted after seeing the prosecutor in the witness box and judging his demeanour. Appellant has a bad record, and has been convicted of selling indecent prints to small boys, and refused to go into the box.

RIDLEY J.: The Court thinks that on the whole this conviction ought not to stand. It seems to us that if the proceedings before the Lord Mayor had taken place before this trial, and the prosecutor cross-examined as to them, the result would probably have been different to what it was. It is not possible to say that logically that is a reason why the verdict should be interfered with, but the conviction is somewhat unsatisfactory. The appellant has a bad character, and has received sentences of penal servitude and hard labour amounting in all to seventeen years; but we must be careful to see that where there is a doubt as to a verdict, it should not be allowed to stand. There was very little corroboration of the prosecutor's story, and as a doubt has now been thrown on his evidence, the conviction must be quashed.

Conviction quashed.

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BEFORE

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MR. JUSTICE LUSH.

THOMAS ALEXANDER.

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Mental deficiency does not necessarily entitle a jury to return a special verdict on the ground of insanity. McLaren (9 Cr. Ap. R. 107; 1913) followed.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 6th September, 1913, at the Central Criminal Court, before Rowlatt J., and was sentenced to death.

Fox-Davies for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted for the murder of Ellen Clarke, with whom he cohabited, and the jury found him guilty, but with a strong recommendation to mercy on the ground of his mental deficiency. The most important point on which this appeal is based does not appear in the shorthand notes, possibly because it occurred during my speech to the jury. After dealing with the question of the appellant's sanity I referred to the possibility of the jury finding him guilty of manslaughter and not murder; upon which the judge said it was not a case of manslaughter at all, but of murder, and declined to allow me to argue the point. This was not a question for the judge, but for the jury. Whether it was or was not a case of manslaughter, I was entitled to make my submission to the jury, and though it was the province of the judge to direct the jury on the law, the issue whether in this case it was murder or manslaughter was for the jury and not the judge.

[DARLING J.: But a judge has the right to direct a jury that

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there is no evidence in the case which will reduce the crime from murder to manslaughter.]

The appellant was admitted to be mentally deficient, and therefore circumstances might have amounted to sufficient provocation to reduce the crime to manslaughter, although the provocation received would not have been sufficient to do so in the case of a normal man. The provocation suggested in this case was that the deceased had said she was going to live with someone else.

[BRAY J.: In *Greening* (above, p. 105), the Court decided that such provocation was not sufficient to reduce the crime to manslaughter.]

In that case the question of mental deficiency was not under consideration. Here there was also evidence of some further provocation received in a public-house; that was some little time before her death. It is not necessary for me to contend now that manslaughter would have been the proper verdict, but that I should have been allowed to argue the point, and that the issue should have been left to the jury. The difference between murder and manslaughter is often only a question of provocation, and if the provocation, no matter what it was, was sufficient in that particular case of mental deficiency, to cause a state of irresponsibility in which a man did not realise the nature and quality of the act he committed, then the provocation, even if only by words, was sufficient to reduce the crime to manslaughter because it eliminated any possibility of malice, which, express or implied, is an essential ingredient in murder.

The evidence of mental deficiency was so strong that the jury ought to have found insanity.

Muir and *Adrian Clark* for the Crown were not called upon.

DARLING J.: In this case the appellant was found guilty of the murder of a woman with whom he lived, and the jury added a rider to their verdict strongly recommending him to mercy on the ground of his mental deficiency. They used those words after an explanation by the judge of what was the state of mind which would justify them in returning a special verdict on the ground of insanity. It is plain that the jury had evidence before them

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which justified them in finding that the appellant was not insane in the legal sense; at the same time they considered him to be mentally deficient. All men who are sane are not of equal mental ability; the verdict means that the appellant was below the ordinary level of sane people, though not across the border line of sanity. On that Mr. Fox-Davies has raised an ingenious argument, which he admits has never been suggested before. He says that where a man is not insane, but is mentally deficient, the jury should consider what amount of provocation would justify them in returning a verdict of manslaughter. Mr. Fox-Davies admits that he cannot limit the point to provocation by words, but must include gestures and prejudice, until one comes to the point where, if a man who has red hair is killed by one mentally deficient, the judge must leave it to the jury whether such a fact was sufficient provocation to reduce the crime to manslaughter. There is no authority for such a proposition, and this Court cannot make laws; that is the function of Parliament.

It is only in exceptional circumstances that words amount to sufficient provocation, and if we were to consider the case as Mr. Fox-Davies wishes, we should have to hold that there was not sufficient provocation here to reduce the crime to manslaughter. It is plain that if words alone would amount to such provocation a preference expressed for another man would be enough; but that would not be within the decision of the Court in *Palmer*, [1913] 2 K. B. 29; 82 L. J. K. B. 531; 29 T. L. R. 349; 8 Cr. App. R. 207. Further, in this case the provocation was not sudden, as it occurred two hours before the fatal act. There is no reason therefore on the facts, even if the rule were established, to hold that the case comes within any decided case on this question.

It has been further argued that the jury ought to have found the appellant insane in the legal sense. In our opinion there is no ground on which to found such an argument. The evidence of what the appellant did is strong to shew that he knew what he was doing. He also made a statement after arrest; he said, "This is all through a row with that barman Sid; he is a married man; he has got a rotten name; what made me wild she said, 'I am a good mind to run off with him now myself'; that caused all the trouble; me having a drink caused me to what I did; he is a barman and she is a married woman, and not the only one she

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has been with. I wish I had not taken on with her; drink is the cause of all the trouble; I lost my temper when I did it; when I found what I had done I lost my memory." This was not the talk of a man who was mad; he knew he had done the deed and that the pre-disposing cause was drink. The Court is of opinion that the evidence proves that the verdict was right. If we came to the contrary opinion and thought that the jury was wrong, there is no doubt that the Court could under s. 5 (4) of the Criminal Appeal Act set aside the verdict and make an order as if a special verdict had been found by the jury; *Jefferson*, 72 J. P. 467; 24 T. L. R. 877; 1 Cr. App. R. 95 (1908). The circumstances in that case were very special, and since then the Court has said on many occasions that although it has the power it will only exercise it in very special cases. See *McLaren* (above, p. 107). In ordinary cases it is best to leave the matter to be dealt with by the Home Secretary. The appeal must be dismissed, but we do not desire to express any opinion which might limit the discretion of the Home Secretary.

Application dismissed.

A. L. B. T.

ARTHUR JAMES AND JAMES SHARMAN.

Severity of sentence.

An accomplice who gives evidence against his co-prisoners may be entitled to a mitigation of sentence.

When a sentence is altered it runs from the date of conviction.

These were appeals against sentence, by leave of the full Court. Appellants were convicted of burglary, on the 24th July, 1913 at the Central Criminal Court, before Ridley J. James was sentenced to seven years' penal servitude, and Sharman to ten years' penal servitude.

V. R. M. Gattie for appellant James, who was present. The appellants were concerned with two other men in a burglary at the Berkeley Hotel; the other two prisoners were also guilty of inflicting serious injuries on a porter at the hotel, but James was

not concerned in that. His age is twenty-six, and he has never been convicted before. It is true that he got the key of the safe from which an impression was taken, but the other two men, who were old criminals, were the instigators. Further, it was mainly through James that the culprits were brought to justice, as he gave information to the police.

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A. Bryan for appellant James Sharman, who was present. Sharman was only guilty of the burglary, and was the only one of the four prisoners who was not represented by counsel at the trial; he had had no previous experience in a criminal court, and was not afforded an opportunity of saying anything in mitigation of his offence, though much could have been said. He had been a stoker in the hotel for two years, and no doubt introduced his brother Stephen, one of the other prisoners, to James, but he says he did not know of his brother's criminal career. This may be true, as Stephen spent many years in South Africa. His age is thirty-five, and he had a good character in the army. He was led into this crime by old convicts, of whose past he was unaware. The sentence is excessive; he had done his best to prevent personal injury to Gowers, and this was his first offence.

Travers Humphreys for the Crown. The sentences must be serious; it can hardly be said that James Sharman did not take part in the attack on Gowers, as his own confession at the police court shews that he knew Gowers was to be attacked; this did not come out at the trial, because after the first witness was called he pleaded guilty. There was evidence of repeated meetings of the four men at S. Sharman's house.

As to Arthur James, he not only made a confession on arrest, which was thoroughly borne out on inquiry, but it was through his evidence at the police court that Stephen Sharman was committed. Fell offered him gold if he would not go into the box, and his life was threatened if he did. Still he gave evidence of the whole story, and thus Stephen Sharman, who probably committed the actual assault, was convicted; moreover, he did everything he could to bring the other prisoners to justice.

DARLING J.: This Court has already dealt with two of the four prisoners. James Sharman, a brother of Stephen, helped Arthur

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James to rob the safe, and was cognisant of the whole plot from the first; he knew that Gowers must be attacked and made no more than a remonstrance. He had a good character, and a less term than ten years' penal servitude is enough. His sentence is reduced to seven years' penal servitude.

Arthur James is in a different category; he was a trusted servant, but he got a key and took the impression of it on soap. He deserves the term of seven years imposed, but the Court reduces it to three, for he betrayed the thieves; it is expedient that they should be persuaded not to trust one another, that there should not be "honour among thieves." He is now rewarded for informing against his accomplices, especially for denouncing Stephen Sharman and for refusing a bribe not to give evidence.

When a sentence is altered, it runs from the date of conviction.

Sentences reduced.

Solicitor for Appellant James—*Harry Wilson.*

Solicitor for Appellant Sharman—*G. Aplin Nichols.*

A. L. B. T.

ALFRED LEE.

Severity of sentence.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of burglary; on the 6th August, 1913, at the Middlesex Sessions; he was sentenced to two years' imprisonment, and recommended for modified Borstal treatment.

Purcell for the Crown. It is clear that the learned Chairman made a mistake. The Commissioners have not the power, as he thought, to grant a licence; they cannot release from "modified Borstal." Exactly the same point arose in *Smith* (above, p. 117). Appellant is paralysed.

BRAY J.: This case is on all-fours with *Smith's* case; "modified" is very different from "Borstal," where defendants

are let out quite early. There has been a misapprehension here. I do not repeat my judgment in *Smith's* case. There is no previous conviction; he cannot go to Borstal owing to his infirmity. His sentence is reduced to four months' imprisonment with hard labour.

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Sentence reduced.

A. L. B. T.

ARTHUR HARRISON.

Severity of sentence in the case of habitual beggars.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of being an incorrigible rogue, and was sentenced to eight months' imprisonment with hard labour, at the County of London Sessions, on the 5th August, 1913.

Appellant in person. The sentence was too severe for begging. I had tried in vain to get work.

A. S. Comyns Carr for the Crown. The police do not agree that appellant tries to get work.

DARLING J.: This is a peculiar class of case. All that appears here is that appellant is always begging, in this case in London at 11.30 p.m., asking for coppers, though he got none. This Court has laid down a rule to guide those who sentence incorrigible rogues in *Edward Edwards*, 73 J. P. 286; 2 Cr. App. R. 79; (1909), where, delivering the judgment of the Court, I said, "Amongst those who adopt the career of begging there are several degrees of begging. . . . A person may beg in such a manner as to put those he addresses in fear, and in such a case, if it appears that he is carrying on the business of begging, the maximum sentence of twelve months' imprisonment with hard labour might very properly be inflicted." This sentence is reduced to three months imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

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BERKELEY BERNARD BENNETT AND ARTHUR JOHN EDWARD
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The fact that something of value was given in exchange for money obtained by false pretences does not necessarily negative an intent to defraud.

The definition of the offence in the London and Globe Finance Corporation, Ltd., case (1903, 1 Oh. at 732, per Buckley J.) approved.

When the hearing of an appeal is adjourned, the Court generally allows sentence to run from that date.

There is no rule that the trial judge should not sit on the hearing of the appeal.

These were appeals against conviction on points of law, and applications for leave to appeal against sentence. Appellants were convicted of obtaining money by false pretences, at the Central Criminal Court, on the 23rd July, 1913, before Ridley J. Bennett was sentenced to eighteen months' imprisonment with hard labour, and Newton to three years' penal servitude.

Comyns Carr for appellant Bennett, who was present. The two appellants were convicted on an indictment, several counts of which included the name of one Count Andor Festetics as being a party with them in the alleged frauds. Festetics had left the country, and his absence gravely prejudiced the appellants, both of whom had surrendered when they heard that warrants were out for their arrest. The following were the facts according to the witnesses for the prosecution. The frauds were alleged to have been practised on a Dr. Thorsch, a young Austrian, who was heir to a large fortune. About the end of 1911 he made the acquaintance of Festetics, who was also an Austrian and his social superior. Festetics introduced the appellants to Thorsch, as they say, under their proper names, but Thorsch said that in the early stages of their acquaintance Festetics told him that Bennett was Mr. Gordon Bennett, the proprietor of the *New York Herald*. At Christmas, 1911, the four men went to stay at a hotel in the Isle of Wight, and there it was said that Bennett told Thorsch

that he was not the real Gordon Bennett, who was a man of sixty-seven, but his nephew, and that he was interested with his uncle in the *New York Herald*; he said, according to Thorsch, that he and his uncle were largely interested in wood pulp and in certain lands in Canada where large quantities of it could be procured; he represented that he owned 60,000 acres of land there, and had an option over 40,000 acres more, the land being suitable for wood pulp; that he had bought it at \$7.50 per acre, and for the sake of friendship would transfer portions of it to Thorsch at the same price, and that Festetics and Newton were prepared to take up portions of the land if Thorsch did.

The parties then crossed over to Bournemouth, where Thorsch parted with two post-dated cheques, one for £5,000, dated the 2nd January, 1912, and one for £3,500, dated the 17th January, 1912; he explained that the cheques were post-dated in order to enable his London bank to be put in funds from Austria. These cheques were handed to Newton, who was represented as being a solicitor in practice acting as Thorsch's representative; he was to hold the cheques until Bennett reported that the money was required. Festetics also handed Newton cheques for the purchase of land, but nothing further was ever heard of them. Thorsch agrees that certain statements were made as to the value of the lands and certain documents shewn to him bearing out these statements. A banking account was opened by Newton in London, and the first of Thorsch's cheques having been cashed through the head waiter at Romano's restaurant, the notes so obtained were paid into the account. Newton explained that he was in financial difficulties and was afraid his creditors would garnishee the account if they heard of it. Shortly afterwards Bennett sailed to Canada, and only returned on 6th February. £2,303 was drawn from the account and cabled to him, and with it he bought 3,200 acres on behalf of Thorsch. During his absence other substantial sums were drawn out, but there was nothing to shew he knew anything about this or received any of the money, and one ground of this appeal is that there was no evidence to support a conviction against Bennett on eight counts relating to money drawn out while he was in Canada and not sent him. The judge in his summing up drew no distinction, and made no reference to Bennett's absence in Canada when these sums were drawn out.

Bennett, in fact, bought the land at \$3.50, and denies that he

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ever alleged that the price he paid was \$7·50. He said that he was selling the land through the instrumentality of Newton and Festetics, who secured most of the profits. The original sale to Thorsch had been of 5,600 acres, and the prosecution alleged that by the time Bennett returned the account was so depleted that there was not enough left to send out the £1,612 required to purchase the further 2,400 acres, but there was no evidence that Bennett knew there was so little money left. On the day of Bennett's return the three men dined with Thorsch, and he says that Bennett then told him that the lands were most valuable, that prices were rising, and that he had bought an additional 50,000 acres, 6,400 of which were for Thorsch, requiring a payment of £10,000, and further portions for Newton and Festetics requiring payments by them. Thorsch said that he objected, but after being together all the evening, finally at 3 a.m. in Thorsch's rooms he was persuaded to agree, and gave them two further post-dated cheques, one for £5,000, dated the 10th February, and one for £5,000, dated 17th March. The banking account shews that 2,400 acres were paid for by a cheque for £1,612 on the 15th February, that the rest of the proceeds of the cheque of the 10th February was drawn out, and that no further payments for land were made. Before the 17th March Thorsch consulted his solicitor, and proceedings were taken to restrain the appellants from dealing with the second cheque for £5,000. A point was made by the prosecution that none of the money was used to buy additional land; the explanation given was that the time for payment was not till after the 17th March, that there was no reason to suppose the cheque would be stopped, and that as the three men were making large profits out of the transaction they were entitled to spend the money.

The case put forward on behalf of Bennett was that he was a member of a firm of land agents, and had obtained from one Oliver an option over 40,000 acres of land in Ontario known as the Veteran Grants, which was land given by the Government to veterans who fought in the South African war, and others, carrying great advantages, such as freedom from export dues. Bennett tried to form a company in Liverpool, and this was confirmed by a solicitor who acted for the proposed directors in the matter and put in a draft prospectus, but this fell through as sufficient subscriptions were not obtained. According to Bennett, Oliver ver-

bally extended the option when it expired in October, 1911, at the price of \$3.50 per acre, and he denies that he ever stated that the land had been actually bought by him. While in Canada he exercised the option over 4,500 acres, and there is no question that the land was bought; the deeds were tendered to Thorsch and refused by him. While there he also arranged to have a further option over 6,500 acres, and if he bought those within a certain time he was to have a further option over 50,000 acres, with a view to bringing out a large company. There was no written contract, but cables and letters from the vendors corroborated his statement. Owing to Thorsch's cheque being stopped he was unable to buy the 6,500 acres within the specified time, and so lost the larger option. I submit it is clear there was a genuine option, and that Bennett was trying to deal in the lands before he ever met Thorsch; there was, further, a genuine purchase on behalf of Thorsch.

The main ground of appeal is that the judge was wrong in law in refusing to leave to the jury's consideration evidence called by the defence as to the value of the lands sold and contracted to be sold to Thorsch, and in directing the jury not to consider such evidence as having no bearing upon the question of intent to defraud, nor to consider the fact that the title deeds had been registered in the name of Thorsch. The indictment charged the defendants under the first count with conspiracy to cheat and defraud, and under the next three counts with obtaining money by false pretences, the false pretences alleged being those of which, as I explained, Dr. Thorsch gave evidence. I contend that none of these false pretences would be likely to influence a man's mind by any other means than by inducing him to believe in the value of what he was buying. It was in dispute whether any of these alleged pretences were made at all; there was only the word of Thorsch on the one side and of the two defendants on the other; it was not disputed that the pretences, if made, were false. It was further in issue that the prosecutor was induced to part with his money on the strength of these representations, and that, if made, they were made with any intent to defraud. A substantial body of evidence was put in to shew that the land was well worth \$7.50 an acre, and more was tendered but excluded by the judge, who said that it had no bearing on any of the three issues before the jury. The evidence

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would have shewn not only the value of the land, but that Bennett believed in its value. Intent to defraud for the purposes of a false pretences indictment is a special kind of dishonesty; it is not merely obtaining fraudulently a special profit, but inducing a man to part with his money, getting little or nothing in return. Here Thorsch got exactly what he thought he was going to get, even though he may have thought that he was purchasing from a different person than he was in fact, and that that person had obtained it on different terms than he really had.

[DARLING J.: In *In re London and Globe Finance Corporation, Ltd.*, [1903] 1 Ch. 728; 72 L. J. Ch. 368; 88 L. T. 194; 51 W. R. 651; 10 Manson, 198, Buckley J. says: "To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury."]

That helps me, for in this case it was material to consider whether what was done was to the injury of Thorsch. The evidence would have thrown light on the question whether the pretences were ever made, for if the land was worth the price asked for it there was no reason to tell lies about it. It is true that the judge told the jury that they could consider that the evidence as to value was true, but he at the same time told them it was immaterial, and that they need pay no attention to it. If a prosecutor admitted that the main thing that influenced him was true, no jury would convict because something else was said that was not true. The evidence was also material on the issue whether there was an intent to defraud. Bennett was an undischarged bankrupt, and Newton had had his certificate suspended and was in financial difficulties, so it might be that though they had a good thing to sell, they told lies about some ancillary matter; at any rate, a jury would be entitled to find that there was no intent to defraud.

A document was sent by Newton to Thorsch at his request a few days after Bennett sailed for Canada, setting out the arrangement come to and giving particulars of the land. This document contained all the statements as to the value of the lands which the defence wished to prove; it contained none of the alleged false pretences, and was in some respects inconsistent with them. It is true this was after the first two cheques had been parted with,

but Thorsch admitted that the documents contained statements similar to those made to him by Bennett, and, in any case, the other two cheques were not parted with till later. Reference ought to have been made to these documents by the judge in his summing up, but he did not do so.

Civil proceedings had originally been taken by Thorsch, and there were omissions from, if not discrepancies in, the statements made by him in connection with those proceedings as compared with his evidence at the trial. The judge failed to comment on this in his summing up, although he did comment on the discrepancies in the defendants' stories on the two occasions. The statement of claim in those proceedings shews that the representations acted on Thorsch's mind by making him believe that the land was worth \$7.50 per acre.

In his summing up the judge misdirected the jury by treating the cases of the two appellants as exactly the same, and by failing to distinguish between them, and also by telling the jury that conspiracy was beyond all question; even if there had been a fraudulent agreement between Festetics and Newton, Bennett might have been an innocent party, and this point ought to have been left to the consideration of the jury. He stated the various matters necessary to be proved in a case of false pretences, but omitted to include the intent to defraud. Later in his summing up he defined intent to defraud by recapitulating the other four elements of the offence. Dealing with the question whether Bennett professed to be Gordon Bennett, he said: "If that is the character of the transaction it makes it at once fraudulent"; this was to withdraw the case from the jury on the question of intent to defraud. He further said: "It seems to me that the value of the land does not matter, for if the governing reason in his mind, as he said, was this, that they had told him these facts, that the land was bought, that it was there for him, that he was treated as their friend and was going to get his share in the profit to come—if you think that is the consideration which induced him, if you think that was the reason why he parted with his money, the case would be made out." He told the jury that Bennett was a very minor person in the matter, but did not direct the jury as to any of the facts which differentiated his case from that of Newton.

The defence of Bennett was never fairly put to the jury as it should have been: *Dinnick*, 74 J. P. 32; 26 T. L. R. 74; 3

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Cr. App. R. 77 (1909); while *Rowan*, 5 Cr. App. R. 279 (1910), is authority that where two prisoners are tried together and put up distinct defences, those defences should be put separately to the jury. A judge should not express his view of the facts in such a way as to lead the jury to believe that questions of fact are withdrawn from them; *Beeby*, 6 Cr. App. R. 138 (1911). In *Ferguson*, 9 Cr. App. R. 113 (1913), the conviction was quashed on the ground that the jury had not been directed that to convict they must find that there had been an intent to defraud; the direction given by the judge in this case was similar to that given in *Ferguson*; the falsity of the pretence and the intent to defraud were treated as identical questions. I do not contend that the jury could not have found an intent to defraud, but that the judge in substance withdrew from the jury the defence that was put forward.

The sentence was excessive when it is remembered that Bennett was genuinely dealing in Canadian lands; he bought blocks of land and registered them in Thorsch's name. Even if a large profit was made on the sale, Bennett only got twenty per cent. of it. By inadvertence it was not pointed out to the judge that he had been detained in custody after arrest for seven weeks before being released on bail.

L. Sanderson, K.C. (with him *G. W. H. Jones* and *Zeffert*), for appellant Newton, who was not present. My first four grounds of appeal are the same as in Bennett's case, and I wish to adopt the arguments of Mr. Comyns Carr, especially as to whether there was any intent to defraud. Further grounds of appeal are that Newton was cross-examined as to the character of Festetics, and the judge misdirected the jury in a material respect in that he said: "Newton was head of the whole concern. . . . He goes to a man whom he knew was a scoundrel, Festetics, for the purpose of obtaining his assistance in carrying out his scheme." The evidence was that Festetics came to Newton and told him that a brother officer of his wanted to invest some money. The questions as to Newton's knowledge of Festetics's character were in effect attacks on Newton's character, which the prosecution were not entitled to make; they were not relevant to any issue in the case.

I also desire leave to appeal against sentence.

[DARLING J.: Unless we give leave to appeal we cannot increase the sentence. Do you still ask for leave?]

Newton is not present, and I should desire to take his instructions after that observation; perhaps I may be allowed to deal with the question later if necessary.

Sir John Simon, S.-G. (with him *R. D. Muir, Travers Humphreys* and *Branson*), for the Crown. On the main point raised, whether there was an intent to defraud, the law was laid down by Channell J. in *Carpenter*, 22 Cox C. C. 618; 76 J. P. 158 (1911), and that case disposes of the contention made. Thorsch said in evidence that he would not have parted with his cheques but for the false statements made, and that the reports as to the value of the land were not the main things that influenced him. A similar direction was given to the jury by Cockburn C. J. in *English*, 12 Cox C. C. 171 (1872). As to the point raised on behalf of Newton with regard to Festetics's character, I asked Newton whether he did not know it, because he himself had been deceived by Festetics; I was particular to put the question so that it could not be thought that I was asking about any previous dishonesty of his own. As to the part played by Newton, there were many proved facts pointing to his being the chief character in the transaction. As to the option at the time the first cheques passed there was no document shewing that the option was in existence, and Bennett had to rely on a verbal promise to keep it alive. There were three cables saying that the later option was in jeopardy and might lapse, but the cables as a whole must be viewed with suspicion.

Comyns Carr. The facts in this case were very different from those in *Carpenter*. Even if goods are obtained by means of false statements, there can be no conviction unless there was an intent to defraud: *Williams*, 7 Car. & P. 354 (1836).

Sir John Simon. That case is explained by Pollock C. B. in *Rowan Hamilton*, 1 Cox C. C. 244, at p. 247 (1845), as turning on the fact that the defendant believed, however erroneously, that he had some sort of right to do as he did.

The application for leave to appeal against sentence was ultimately withdrawn.

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DARLING J.: In this case the appellants were indicted for conspiring together to cheat and defraud, and also for obtaining money by false pretences from one Dr. Thorsch. A warrant was issued originally against a Count Festetics in conjunction with the present appellants, but he fled the country and evaded arrest. The three men made false representations to Dr. Thorsch, an Austrian, who had apparently been serving in the Austrian army at the same time as Count Festetics, which induced him to part with a sum amounting to £13,500, of which a very large proportion went into the pockets of the appellants and Count Festetics. How did Thorsch come to part with his money? That is the first thing we have to consider. In order to establish the offence of obtaining money by false pretences it is necessary to prove what was laid down by Buckley J. in *Re London and Globe Finance Corporation, Limited*. He said: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury." In this case there is no doubt that there was ample evidence that Bennett and Newton, together with Festetics, did deceive Mr. Thorsch, and that they did make false statements to him and induce him to believe them, and because he believed them he handed over £13,500. It is true that a certain amount of the money so obtained was laid out in the purchase of land in Canada, and this gave rise to an ingenious argument on the part of Mr. Comyns Carr, who represents the appellant Bennett, and whose argument was adopted in its entirety by Mr. Sanderson on behalf of Newton. He contends that because some of the money obtained from Dr. Thorsch was laid out in the purchase of land in Canada, which was what Thorsch intended the money to be expended on, this conviction cannot be supported because the judge at the trial excluded evidence of the value of the land in Canada. Shortly put, it is contended that owing to the exclusion of this evidence the defendants were deprived of the opportunity of proving that, however much they may have been guilty of deceit and fraud, they did not induce Thorsch to act to his injury. Now it must be taken that all the charges which were contained in the indictment were proved, but it is contended that because the learned judge at the trial would not admit evidence as to the value of the land proposed to be purchased,

the charge of obtaining money by false pretences was not fully established. Because Bennett, in fact, bought certain uncleared land in Canada with Thorsch's money, it does not follow that the transaction resulted in no injury to him. Even if some land was bought for Thorsch, that was not what they obtained his money for. Thorsch thought he was not merely buying land, but that he was buying it in conjunction with the proprietor of the *New York Herald*, and that the land not only might be, but was, extremely valuable, because it was land from which the *New York Herald* would obtain wood for the purpose of its paper supply. At the trial Ridley J. was asked to admit evidence that the land was really valuable. He told the jury that it was admitted that the land was valuable, and he did not exclude all the evidence upon this point, but he excluded some. Evidence was tendered that the land was worth $10\frac{1}{2}$ dollars an acre, and the jury had that before them, but the judge pointed out that that was not a question in the case. The point was, as found by the jury, that Thorsch had been induced by false pretences to part with £13,500. The land bought by Dr. Thorsch had no special advantage, and he did not obtain what he was led to expect he would. It was established, therefore, in the words of Buckley J. that Thorsch was induced to believe as true that which was false, and which the person practising the deceit knew, or believed to be false. The only question, therefore, is whether he was defrauded, that is, was he led to act to his injury by the deceit? It was represented to him that he was buying land with particular and peculiar advantages. That land he never got, and the evidence, which it is said ought to have been admitted, would not have shewn that the land possessed these advantages. Further, he would not have been associated in the business with the proprietor of the *New York Herald*, because Bennett was not in fact related to him.

It has been argued that the evidence as to the value of the land would have gone to shew that there had been no intent to defraud, and that no false pretences had been made, because if the land was valuable it was unlikely that the appellants would have made use of false pretences, since the land might have been sold without them. There is something in that argument, but not enough to lead us to quash the conviction. No one reading the whole of the evidence could suppose that if the appellants could have sold the land to Thorsch without making false pretences they would have

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made the various and complicated false pretences which they did, nor that the jury would have come to the conclusion, if the land had been proved to be valuable, that the false pretences were not made. One of the false pretences alleged was that land had been actually bought at $7\frac{1}{2}$ dollars per acre, while at that time no land had been actually bought, and when subsequently acquired it was bought at $3\frac{1}{2}$ dollars per acre. "Commission" at the rate of more than half the entire purchase-money was charged by the appellants and their confederate Count Festetics, but Dr. Thorsch was not informed of any of these facts. The appellant Newton was so anxious that the cheques which were handed over by Dr. Thorsch should not be traced to him that he obtained cash for one of them from a waiter in a well-known restaurant, and paid the money so obtained into a bank. With regard to the question of value it must not be taken that the Court lays down as a matter of law that evidence of value in a case of false pretences is immaterial, since it may be of the greatest importance, but the Court in the present case is satisfied that the learned judge at the trial was justified in taking the course which he adopted. A point was also taken on behalf of the appellant Newton that he had been improperly cross-examined as to character. The question to which exception was taken was really directed to shew the character of Count Festetics and not that of Newton, and the Court thinks that the questions put by the Solicitor-General were carefully framed and did not come under the category of cross-examination as to character of the defendant. The Solicitor-General was aware of many things in the career of Newton which told against his credit and character. Newton was a solicitor, who at the time was unable to practise because he had been suspended by the Court of King's Bench for gross and abominable conduct as solicitor in the *Crippen* case. I was a member of the Court which suspended him from practice for twelve months, and I was of opinion that he was treated with extreme leniency. There were other things to which reference might have been made if it had been intended to attack Newton's character. The point on which he was cross-examined was absolutely germane to the particular crime with which he was charged.

Bennett appeals against sentence, but in the opinion of the Court, if the sentence errs at all, it is on the side of leniency. The fraud was a very deliberate one, and was carried on by a great

deal of ingenious machinery. Newton also had desired to appeal against his sentence, but we felt bound to indicate to his counsel that if leave were given the Court would have power, not only to reduce the sentence, but to increase it. That was not done with a view to deterring Newton from appealing, but to give him fair warning that the Court held the opinion that three years' penal servitude was little enough for the crime he had committed, and that if he persisted in appealing, we should feel bound to inquire a good deal more closely concerning him. He has now wisely abandoned his appeal against sentence, and the result is that the appeals are dismissed upon all points as regards both appellants, and the sentences stand.

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On an application that the sentences might run from the date of conviction, Darling J. said that on August 15 (see p. 130 n. above) the case was in the list, but defendants wished it to be postponed because the trial judge was then a member of the Court. There was, of course, no statutory objection to the judge sitting, and it would almost be impracticable to prohibit this unless there were more judges in that division. There was always an investigation by a single judge before a case came into that Court, and there must be at least two other judges with the trial judge. It was a great mistake to suppose that the trial judge would be inclined to set up his view against the opinions of his brethren or "to fight for his own hand." The trial judge in this case at once assented to the adjournment. Lord Alverstone had always strongly objected to such applications being granted as matters of course. As, however, the Court had granted this one, sentences might run from August 15, as if the appeal had been heard that day.

Appeal dismissed.

Solicitors for the Appellants—*Cecil Holt & Co.*

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL,
AND MR. JUSTICE LAWRENCE.

JOHN ALBIS.

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Murder.

The plea of provocation may be rebutted by the occurrence of a long interval before the commission of the offence, especially if that be due to a desire for revenge.

This was an appeal against a conviction for murder, at the Central Criminal Court, on Oct. 10, 1913, before Lush J., followed by a sentence of death.

The prisoner, Jon Albis, and the deceased man, Bernard Balod, were on the 21st September last fellow-seamen on board the steamship "Bowes Castle," a British ship on a voyage from Las Palmas to Dunkirk. On the day in question the ship was on the high seas about 300 miles north-east of Las Palmas, proceeding in the direction of Dunkirk. The prisoner, Jon Albis, had joined the ship at Rotterdam, and was employed as a donkey-man. He was a Roumanian by birth. The deceased man, Bernard Balod, was a Russian Finn, and occupied the position of boatswain on board the "Bowes Castle." The prisoner and Balod occupied cabins directly opposite each other, Balod sharing his cabin with the ship's carpenter, August Thompson. On the day referred to, the 21st, about midday, Bernard Balod and the prisoner Jon Albis were in their respective cabins, the door of each cabin being wide open. The prisoner was taking off some of his clothes, and whilst he was so engaged Balod made use of an obscene expression to him. An altercation followed, ending in a fight between the two men, in the course of which both received injuries. The fight lasted for something like two minutes.

On the following night, Monday, the 22nd, about 10.30 p.m., August Thompson, the ship's carpenter, and Bernard Balod turned

in for the night, Balod occupying the top bunk in their cabin. About midnight the prisoner, who was then in his own cabin, started talking to another seaman about Balod, and made use of some such expressions as "This trouble not finished yet"; "I go and start it again"; "I kill him." About 1 a.m. August Thompson woke up on hearing a noise in his cabin, and noticed a drop of fresh blood on his left hand. The light was full on, though it had been turned off some time before. Albis was standing in the cabin, and told Thompson to go and tell the skipper "I been doing that." Thompson then looked at the top bunk and discovered Balod lying there dead with three severe wounds on his neck. The prisoner Albis at once admitted that he had killed Balod with an axe which he had thrown overboard. He was detained in custody on board ship, and was ultimately arrested at Dunkirk and charged with the wilful murder of Bernard Balod. He did not deny the charge, and subsequently at the trial pleaded guilty, but on the advice of the learned Judge he withdrew that plea and was defended by counsel at the request of the judge. The jury found him guilty of the wilful murder of Bernard Balod.

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JOHN ALBIS.

Darling J.
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Montague Shearman, Junr., for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. One question in this case is, Did the learned judge at the trial leave the question of provocation to the jury? The defence of provocation, which, if properly established, would have the effect of reducing the crime from murder to manslaughter, was put forward by me at an early stage of the trial. It was suggested that the provocation received went beyond a filthy expression, and really consisted in a grossly immoral suggestion on the part of the deceased man. But the learned judge told the jury that provocation must consist of acts done, and did not leave it to them to say whether an immoral suggestion by the deceased might not amount to provocation. It should have been left to the jury to draw an inference from the general conversation as to what was really intended by the deceased man. Another point is whether the prisoner had had sufficient time to cool down from the effects of the violent passion into which he was thrown by the suggestion of the deceased. This might be a question for the Home Secretary, but was an important element in considering whether the crime should have been reduced from murder to manslaughter.

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Boyd (with him *Roome*), for the Crown, was not called upon.

JOHN ALBIS.

Darling J.

DARLING J.: In this case the appellant was convicted of the wilful murder of Bernard Balod on the high seas, and it is now contended that the learned judge at the trial did not properly direct the jury as to certain expressions used by the deceased man, which are said to have amounted to provocation sufficient in law to reduce the crime from that of murder to manslaughter. It must, however, be remembered that even assuming such provocation to exist, many hours had elapsed before the attack which caused death. The man who was killed was asleep in his bunk when attacked, so that there could not have been any question of immediate provocation. All murders, except those committed for the sake of gain, are committed after provocation of some sort. If the provocation took the form of blows, and only a short time elapsed between the blows and a murder, a jury might be warranted, on receiving a proper direction from the judge, in reducing their verdict to one of manslaughter. But in the present case the appellant had had plenty of time for his passion to cool down, and his attack on the deceased took the form of revenge some time after any alleged provocation, and was entirely inexcusable. The appeal must be dismissed.

Appeal dismissed.

R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING
AND MR. JUSTICE ATKIN.

ALFRED BROWN.

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If a criminal who evades arrest does honest work during that period, the fact should be considered in his favour on the question whether he is a habitual criminal.

This was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted of shop-breaking and of being a habitual criminal on the 10th September, 1913, at the County of London Sessions, and was sentenced by the Vacation Deputy-Chairman to three years' penal servitude and five years' preventive detention.

Appellant in person.

Roome for the Crown. The appellant was discharged from prison on the 29th September, 1912, and he committed the crime of shop-breaking, of which he was convicted, on the 22nd March, 1913. His brother, who was concerned with him in the offence, was arrested, but the appellant escaped, left London, and joined a travelling circus, with which he toured the country for about four months. He returned to London on the 10th August, when he was arrested. The only doubt in the case is in reference to the direction given by the Vacation Deputy-Chairman to the jury with regard to this period. He said: "A man who is a fugitive from justice from March 22nd, when he ran away, to August 10th, when he was caught, can hardly be said to be leading an honest life, and you may find that he was leading a dishonest and criminal life during that time, because he was a fugitive from justice." This, I submit, was a proper direction; the period to be considered

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is the time between the last release from prison and the commission of the primary offence. There was evidence that in that period he was associating with criminals. In all the decided cases the time of the commission of the primary offence has been taken to be the material period: *Mitchell*, 28 T. L. R. 484; 76 J. P. 423; 7 Cr. App. R. 283 (1912), but that may be because, as a rule, the arrest is effected then or shortly afterwards.

[THE LORD CHIEF JUSTICE: We have no doubt that the point to look at is the time of conviction.]

If the passage stood by itself it might be an improper direction; the whole summing up must be looked at; and from that it is apparent that a careful direction was given of what constitutes a habitual criminal, and that the evidence was carefully sifted. The passage only means that the jury can hardly find an intention of leading an honest life and reforming, because he is forced to do so from fear of arrest. In any case, the jury were not misled, because, when told to consider their verdict, the foreman said: "We made up our minds long ago."

[DARLING J.: That may have meant after hearing the direction that is being discussed.]

THE LORD CHIEF JUSTICE: This is an application for leave to appeal against conviction as a habitual criminal, and also an appeal against sentence. This appellant was convicted under a statute which has given the State extended rights over a prisoner, and which enables the Court to sentence him to preventive detention if he is found to be a habitual criminal. The Legislature recognised that this was an interference with the liberty of the subject and an extension of the rights of the State. The prisoner is not only punished for the offence of which he is convicted, but if the conditions of the statute are satisfied, he is sentenced to a further period of detention. The Legislature has taken great care that every opportunity should be given to a person charged under the statute of showing that he is not a habitual criminal, or that he has tried to get honest employment. The point argued here for the Crown is that the fact that the appellant had for four months preceding his arrest been employed at a circus,

and that there was evidence that he conducted himself there honestly, was not evidence to negative the charge that he was a habitual criminal. The first question that arises is whether the term between the commission of the offence and his arrest is to be considered at all. It seems to us that what the jury must consider is whether at the time of conviction for the particular offence with which he is charged he "is leading persistently a dishonest or criminal life." Unless he is doing so at that time he cannot be convicted under s. 10 (2) (a) of the Prevention of Crime Act, 1908. Importance attaches to the word "is"; it means at the time of conviction. The jury ought to consider, and the judge ought to direct them to consider, what happened in the period from the time of the commission of the offence to the trial if there is any evidence that the prisoner has been leading an honest life during that interval. In this case it is difficult to see what direction the Deputy-Chairman intended to give the jury. He said: "A man who is a fugitive from justice from March 22nd, when he ran away, to August 10th, when he was caught, can hardly be said to be leading an honest life, and you may find that he was leading a dishonest and criminal life during that time because he was a fugitive from justice." We think that that puts the case a little too strongly against the prisoner. It is true that later the Vacation judge gave a somewhat different direction, and one which, if it stood alone, would be correct; he said: "You must seriously consider whether during the last few months since October 28th he has been leading a persistently dishonest and criminal life. There is evidence upon which you can find that. If you are in doubt as to that, the Court of Criminal Appeal will settle that and put that right, but for the purposes of this case I direct you to find there is evidence, but you must not find that unless you are satisfied that during the last few months he has been leading a persistently dishonest and criminal life." The difficulty arises when looking at the summing up as a whole. The Deputy-Chairman seems to have had some doubt whether he had not adopted a criterion which was too harsh towards the appellant, and he seems to have tried to modify it. But we are not satisfied that as regards these last months the jury may not have come to a conclusion against the prisoner merely because he was a fugitive from justice, and may not have omitted to consider, as they should, and as they ought to have been directed to consider, that there were

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some months during which he worked properly. It is not a matter of law except as to the direction. It is necessary that in these cases there should be a very careful direction when the jury have already convicted a prisoner. We think that the direction in this case was not satisfactory. The conviction and sentence as a habitual criminal must be quashed.

Conviction as habitual criminal quashed.

A. L. B. T.

DANIEL FISHER, THOMAS FISHER AND BENJAMIN GROUT.

Localisation, for the purposes of the Betting House Act, 1853, 16 & 17 Vict. c. 119, is a question of fact for the jury.

These were appeals against conviction, and, except in the case of Grout, against sentence, by leave of Bailhache J. Daniel Fisher and Thomas Fisher were convicted of using premises for betting, at the County of London Sessions, on the 25th August, 1913, and were each fined £70 and ordered to pay £15 costs. Grout was convicted at the same time of permitting premises to be used for betting and of assisting in the management of a house kept for the purposes of betting, and was bound over to be of good behaviour.

Wickham for the appellants, who were not in custody. The main ground of appeal is that the Deputy-Chairman was wrong in holding that a common passage leading to a common stair in a house was a place within the meaning of s. 3 of the Betting House Act, 1853, because Grout had the right to use the passage, and in directing the jury that Grout might be in a position to grant authority to use the passage. Grout had only the right to pass over the passage to get to his rooms which were upstairs; he was a trespasser if he used it for any other purpose. It might well be that Grout was not in a position to grant authority with regard to it to anyone. I referred in the course of the case to *Powell v. Kempton Park Racecourse*, [1899] A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; 47 W. R. 585; 63 J. P. 260;

19 Cox C. C. 265; *Brown v. Patch* [1899] 1 Q. B. 892; 68 L. J. Q. B. 588; 80 L. T. 716; 47 W. R. 623; 63 J. P. 421; 19 Cox C. C. 330; and to *Wright v. Smith*, 6 F. (Just. Cas.) 18 (1903).

The latter case was decided under the Edinburgh Municipal and Police Act, 1879, but s. 284 of that Act was modelled on the Betting House Act, 1853. It was there held that "the words 'any house, building, room, or place' did not cover a common passage leading to a common stair, and that a complaint charging the accused with keeping or using such passage for the purpose of betting contrary to s. 284 was irrelevant." The Deputy-Chairman paid no attention to these authorities, and did not even refer to them when summing up. He also refused to allow me to ask Grout whether he had power to stop people coming in the passage. He told the jury that the law could not be evaded by carrying on the betting business just outside a room; this was directly contrary to *Wright v. Smith*.

He also made a mistake as to a date stated by one of the witnesses for the prosecution, and when I called his attention to it refused to refer to the shorthand note to verify it. This happened in the course of the case, not in the summing up.

(Counsel proceeded to mention other grounds of appeal which turned on the facts of the case, and are not material for the purposes of this report.)

E. C. P. Boyd for the Crown. I submit that the Deputy-Chairman was right. To obtain a conviction it was necessary to prove definite localisation of the betting and that the place was used by the appellants as an office. The person using it need not be the owner or occupier, nor need he have the consent of the owner or occupier; it is sufficient if the person using the place is in a position analogous to that of owner or occupier: see *Brown v. Patch* and the *Kempton Park* case. The only person who could have any control over the passage at the time the betting took place there was Grout. It was a private house in which Grout had rooms on the second floor; two other men had rooms in the house, but they were not in the house at the time. *Wright v. Smith* relates to different circumstances, a common passage and a common stair where there was no definite localisation of the betting. If the Fishers used the passage with

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the consent of no one, and Grout was not in the position of owner or occupier of the house or passage, they could still be convicted: *Brown v. Patch*. The Deputy-Chairman ruled that it was necessary that Grout should have given them permission, but that was a misdirection in favour of the appellants. If the Fishers had no authority from Grout to use the passage they were "squatters" and came within the decision in *Burton v. Scott*, 73 J. P. 133; 100 L. T. 390; 21 Cox C. C. 799; 25 T. L. R. 239 (1909). They would be in the same position as trespassers who take possession of a place which does not belong to them for the purpose of betting. There was evidence that Grout kept watch while the betting was going on, so he was rightly convicted of assisting in the management of the betting business, even if not of permitting, as owner or occupier, the premises to be used for betting.

As to the suggested misdirection as to the 6th June, the Deputy-Chairman dealt at length with the *alibi* set up for that day, and told the jury that the police might have been mistaken as to a day. Even if the *alibi* was proved for that day the verdict was a proper one, as the men were charged with a continuing offence.

Wickham. There was no localisation here. In *Brown v. Patch* the prisoner was owner of the stall and his name was written up. The sentences on the Fishers were too severe; their betting business had always been honourably carried on; the heavy expenses they were put to over the trial ought to have been taken into account, as an application to the High Court, in which they were successful, was made during the police-court proceedings, directing the learned magistrate to give defendants the option of trial by a jury.

THE LORD CHIEF JUSTICE: The appellants, Daniel Fisher and Thomas Fisher, were convicted of using premises for betting, and Grout of permitting premises, of which he was the owner or occupier, to be used for betting, and of assisting in the management of a house kept for the purposes of betting. Mr. Wickham on their behalf has raised several points which all in substance go to the question of law, that they could not be convicted of using the passage for betting, as it was not a place within

the meaning of the Act. It was pointed out by Lord Alverstone L.C.J. in *Deaville*, [1903] 1 K. B. 468; 72 L. J. K. B. 272; 88 L. T. 32; 51 W. R. 604; 67 J. P. 82; 20 Cox C. C. 389: "If you get sufficient localisation of the betting business, as is the case where the betting man is in possession of the particular plot of ground or structure on which he carries on his business, the question of the permission or licence of the owner of that plot or structure to use it for betting purposes is immaterial. That is what was pointed out in *Brown v. Patch*." Therefore, what has to be considered is a question of fact. We think that question was properly left to the jury, and looking at the summing up as a whole, we have no fault to find with it.

The point has been taken that there was no evidence against Grout. No doubt if, in fact, he was permitting the place to be used for the purposes of betting, he came within the Act. The jury convicted him on evidence which was ample for the purpose and on a proper direction.

Other points have been raised to shew that the evidence was unsatisfactory. To dispose of them all, it is sufficient to say that they were incidents arising in the course of the case which were not of much importance, and in respect of which no complaint has been made of the summing up. It would be dangerous and mischievous if, for example, on account of an erroneous observation as to a date on one occasion by the judge during a long trial, this Court should interfere with a conviction. We have to look at the whole trial, and to consider whether it can be said that the jury were misled in arriving at their verdict by any such earlier remarks before the evidence was completed, and before the speeches of counsel and the summing up. In our view the jury were not so misled, and the appeal as to conviction fails, and there is nothing in the sentences to complain of.

Appeals dismissed.

Solicitors for the Appellants—*Thorne Mockridge & Co.*

Solicitors for the Commissioners of Police—*Wontner & Sons.*

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DANIEL
FISHER,
THOMAS
FISHER
AND
BENJAMIN
GROUT.

ISAACS L.C.J.

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Isaacs L.C.J.

Darling J.

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GEORGE BRUCE.

Mitigation of sentence in view of facts not known to the Court below.

This was an appeal against sentence, by leave of Bailhache J. Appellant was convicted of larceny, at the County of London Sessions, on the 25th September, 1913, and was sentenced to nine months' imprisonment with hard labour.

Appellant in person.

Spratling for the Crown. The fact that before this offence the appellant had a good character was not brought to the notice of the learned Chairman. Appellant gave no information to the police to enable them to make inquiries. He has now done so, and they find that he is an old soldier of good character.

THE LORD CHIEF JUSTICE: The appellant was convicted of stealing two brass taps from an unoccupied house. It has been properly pointed out to us by counsel for the Crown that certain facts in his favour were not known at the trial, and consequently were not brought to the notice of the Chairman. We are sure that if they had been he would not have passed such a severe sentence, and we are of opinion that it ought to be reduced to three months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

JOHN MARTIN.

The Court discourages sentences of penal servitude for thefts of goods of small value, even when the prisoner has been previously convicted.

This was an appeal against sentence, by leave of Atkin J. Appellant was convicted of larceny, at the Bristol City Sessions, on the 6th October, 1913, and was sentenced to five years' penal servitude.

Appellant, who was not present, was not represented by counsel.

F. E. Weatherly for the Crown. The appellant had been frequently convicted before, and in nearly every case he committed a crime shortly after being released from prison. The Recorder was satisfied that the boy Pitt, who was indicted with him, was very much under his influence.

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THE LORD CHIEF JUSTICE: The appellant pleaded guilty to two indictments which charged him with larceny jointly with another prisoner, and he was sentenced to five years' penal servitude. It appears that the value of the stolen goods was fourteen shillings in the one case, and fifteen shillings in the other; also that his record was a very bad one. He was sentenced in 1906 to five years' penal servitude for a coinage offence, which is a serious matter, after having had a sentence of twelve months' imprisonment with hard labour for a similar offence. The Recorder thought that the appellant had a considerable share in leading the other prisoner into crime, but we think that a less sentence would be sufficient to destroy that influence, at any rate, for a considerable time, and that, apart from this consideration, the punishment is too severe for the offences, and we therefore reduce the sentence to eighteen months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

ALBERT CHRISTIE.

The principle in Norton's case (1910, 2 K. B. 496; 5 Cr. App. R. 65) applies whether the maker of a statement, put in evidence as "hearsay," is called or not.

This was an appeal against conviction and sentence, by leave of Atkin J. Appellant was convicted of an indecent assault, at the Middlesex Sessions, on the 17th September, 1913, and was sentenced, on the 17th October, by the Deputy-Chairman, to nine months' imprisonment with hard labour.

A. Bryan for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The assault in this case was said to have been committed on a boy of five years old, and the ground of appeal is that evidence was wrongfully admitted, and that the Deputy-

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Chairman misdirected the jury by telling them that this evidence was corroboration of the evidence of the boy. The evidence in question was given by the boy's mother and by P.C. Crooks, and consisted of evidence of statements as to what the boy said the appellant had done to him, made in the presence of the appellant, and the truth of which was denied by the appellant at the earliest opportunity. I submitted that the evidence was inadmissible on the authority of *Norton*, [1910] 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550; 5 Cr. App. R. 65, but my objection was overruled. If the boy's statement was not admitted by the appellant the evidence was irrelevant. The only difference between this case and *Norton* is that here the boy was called as a witness; at the police-court the magistrate refused to accept the boy's evidence on the ground that he was too young; I suggested that the same course should be taken at the trial, but the boy was allowed to give evidence. (He was stopped by the Court.)

E. J. Purchase for the Crown, In *Norton* the statement that was held to be inadmissible was the only evidence of the complainant's story; here every allegation complained of had already been given in evidence by the boy himself. The evidence was admissible as shewing the boy's consistent conduct: *Osborne*, [1905] 1 K. B. 551; 74 L. J. K. B. 311; 92 L. T. 393; 69 J. P. 189; 21 T. L. R. 288; 53 W. R. 494. Even if the evidence was inadmissible, there was no miscarriage of justice. No fresh matter was introduced in the statement beyond what had already been deposed to by the boy.

THE LORD CHIEF JUSTICE: The appellant in this case was convicted of an indecent assault upon a male person, and the only question which arises is whether evidence was properly admitted of a statement made by the boy in the presence of the appellant and of a police-constable, a statement which undoubtedly charged the appellant with the offence for which he was tried. The appellant, far from admitting the truth of the statement, denied its truth. *Prima facie* that brings the case directly within the decision in *Norton*, and the only question is whether this case is distinguishable from *Norton*. The Deputy-Chairman had the point brought clearly to his notice by Mr. Bryan,

but he took the view that the case could be distinguished from that of *Norton*. That case decided that the contents of a statement alleged to have been made in the presence of a prisoner cannot be given in evidence unless and until the judge has satisfied himself, from the evidence contained in the depositions or given at the trial, that there is evidence, fit to be submitted to a jury, that the prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the statement. It is clear here that the appellant there and then denied the statements made by the boy, and the only distinction drawn is that in *Norton* the girl who made the statement was not called as a witness. We cannot see how it can be said that because the person is not called it can affect the principle there laid down. Pickford J. puts it very shortly in that case after some valuable remarks on the admissibility of such evidence; he said: "This seems to us to be correctly and shortly stated in Taylor on Evidence, s. 814, p. 574, 'The statements only become evidence when by such acceptance he makes them his own statement.'" Where there is a definite contradiction the evidence is inadmissible. We cannot distinguish this case from *Norton*.

It has been argued that the admission of the evidence was not a substantial matter, and that there has been no miscarriage of justice. The test must be whether the jury would have come to the same conclusion if the evidence had been properly excluded. We are unable to say that they would have come to the same conclusion, and it is insufficient to say that they might have done so. Therefore, the conviction must be quashed.

Conviction quashed.

A. L. B. T.

ALFRED HILLIARD.

*On an indictment for larceny by a trick the jury must be specifically directed on the point whether there was an intention to pass the property.
Though the Court may agree with the verdict it will quash a conviction unless it is satisfied that, with a proper direction on the law, the jury must necessarily have arrived at it.*

This was an appeal against conviction by leave of the full Court, granted on the application of *Hawlin* for the appellant,

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on the 27th October. Appellant was convicted of larceny, on the 24th September, 1912, at the County of London Sessions, and was sentenced to six months' imprisonment with hard labour.

Hawtin for the appellant, who was present. The appellant was convicted of larceny by means of a trick, the evidence for the prosecution being that he was in a railway carriage in a corridor train with the prosecutor, and after the train had started they were joined by a third man, who produced a pack of cards. The prosecutor was invited to drink some whisky out of a bottle, which he said was drugged, and he then took part (as the Chairman assumed, though it was not in evidence) in the three card trick, at which he lost £10. The appellant's defence was an alibi, and my first ground of appeal is that the question of identity was not sufficiently left to the jury. The prosecutor said at the police-court that he only identified the appellant by his general appearance, but at the trial he said he identified him by a scar on his chin. The appellant says that he has no scar, and the jury should have been asked to satisfy themselves whether there was a scar on his chin or not. The omission to direct the jury on this point amounted to a misdirection: *Wann*, 107 L. T. 462; 76 J. P. 269; 28 T. L. R. 240; 7 Cr. App. R. 135 (1912).

(Darling J. left the bench and examined the appellant's chin, but the result of this examination was not stated.)

My second point is that the facts disclosed by the evidence did not amount to the offence of which he was convicted. In larceny by a trick possession is not obtained against the will of the owner, which is an exception to the general rule. But here there was evidence that he intended to pass the property. He was prepared to go on playing in the hope of winning his money back, and if he had won he would have accepted and kept the money paid to him. (He was stopped by the Court.)

Dickens, K.C. (with him *Fishbourne*) for the Crown. No doubt this case is near the line. There is larceny by a trick where a man obtains possession of money with *animus furandi*, and the prosecutor of his own free will intends to pass the possession but not the property. Here part of the scheme was to drug the pro-

secutor; there can be larceny where a person parts with his property under the influence of threats, and the same principle applies where his brain is influenced by a drug. The jury could draw two inferences from the fact that the prosecutor was given the drugged whiskey; (1) that it was done with the intention of defrauding him; (2) that it was done with the intention of influencing his mind.

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[THE LORD CHIEF JUSTICE: Our view is that on the evidence those inferences could be drawn by the jury, but our difficulty is whether the Chairman directed the jury to the material point in the case. Given a proper direction, we think there was ample to support the conviction.]

The summing up was not altogether satisfactory, but the Chairman put the usual question to the jury whether they found that there was a preconcerted scheme to get money from the prosecutor by means of a trick. I do not know of any case where a further direction has been given. In *Moore*, 1 Leach, 314; 2 East P. C. 679 (1784), the judge did not put the question whether the prosecutor intended to pass the property, and it was held that it was obvious that if the question had been asked the jury could have given only one answer. The same principle applies under the Criminal Appeal Act, and there was here no substantial miscarriage of justice. If the jury had been asked whether the prosecutor, after being drugged for the purpose of affecting his mind, intended to pass the property, unless it was legitimately won, they could have given only one answer. There may be an intention to pass the property only on the happening of a certain event: *Oppenheimer v. Fraser*, [1907] 2 K. B. 50; 76 L. J. K. B. 306; 97 L. T. 3; 12 Com. Cas. 289; 23 T. L. R. 410; but the jury in this case would certainly have held that the event never happened, and never could happen. In *Solomon*, 17 Cox C. C. 93; (1890), what is known as the purse trick was held not to be larceny by a trick; the determining factor is the state of mind of the person who receives the property. The only inference that can be drawn from the drugging is that there was not the intention of playing fairly. In *Buckmaster*, 20 Q. B. D. 182; 57 L. J. M. C. 25; 57 L. T. 720; 36 W. R. 701; 16 Cox C. C. 339; 52 J. P. 358 (1887); C. C. R., the prisoner was convicted, although the

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prosecutor admitted that he did not expect to get the same coins back. This case comes within the decision of the Court in *Cohen and Bateman*, 73 J. P. 352; 2 Cr. App. R. 197 (1909), where Channell J. said: "If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or, at all events, no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision on a point of law."

THE LORD CHIEF JUSTICE: In this case the appellant was convicted of larceny, and sentenced to six months' imprisonment with hard labour. It appears from the facts proved at the trial that the prosecutor and the appellant were passengers in the same corridor carriage of a train starting from Paddington; they got into conversation when a third man appeared, produced a pack of cards, and they then proceeded with what is known as the three card trick. The prosecutor stated that a bottle of whiskey was handed to him, and that it was drugged; he took a sip and noticed a queer sensation; he was induced to take a further sip and noticed a similar sensation. He said that this seriously affected his will power. He undoubtedly passed £10 intending to part with the possession. The law on the point was stated by Manisty J. in *Buckmaster*: "On the authorities it is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny." Here the prosecutor parted with the possession, but there is certainly evidence that he did not intend to pass the property as well as evidence of an intention to steal it in the mind of the person who obtained possession. All the material elements of the offence were present if the jury found that they existed, and we are clear that there was sufficient evidence from which the jury could properly draw the inferences necessary to support a conviction. We agree with the law as stated by Mr. Dickens, and we also think that there was sufficient evidence of the identity of the appellant, and that there is no fault to be found with the summing up on that point.

Our difficulty is that the Chairman had not the precise point of law clearly in his mind, and that he did not draw the attention of the jury to it, so that they could direct their minds to it. In our view it was not sufficient to leave the case to the jury without a direction on the law. Though we may form an opinion as to what the result would have been if there had been a proper direction, we are not able to say with certainty that the jury, on a proper direction, would have found that the offence had been committed. It was a case in which it was necessary for the jury to have their minds directed to the legal requisites of the offence with which the appellant was charged; we are not satisfied that the summing up did direct the minds of the jury to the precise point; and we are satisfied that without it the conviction ought not to stand. The appeal must therefore be allowed.

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ISAACS L.C.J.

Conviction quashed.

Solicitors for the Appellant—*Edgar Smith & Co.*

A. L. B. T.

ALFRED CHAINEY.

A verdict of "negligence" on an indictment under s. 17 of the Children Act, 1908 (8 Edw. 7, c. 67), is a verdict of not guilty, as mere negligence is not an offence within that section.

This was an appeal against conviction on a point of law. Appellant was convicted, on the 10th October, 1913, at the Salisbury City Sessions, of causing or encouraging the unlawful carnal knowledge of a girl under sixteen years of age, and was sentenced to three months' imprisonment with hard labour.

The appellant was indicted with his wife, who was also convicted, under s. 17 of the Children Act, 1908, as amended by s. 1 of the Children Act (1908) Amendment Act, 1910. The case for the prosecution was that the appellant came within s. 17 (2) of the Children Act, 1908, which enacts as amended by the addition of the words in italics: "For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution or *unlawful carnal knowledge* (as the case may be)

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of a girl who has been seduced or become a prostitute *or been unlawfully carnally known* if he has knowingly allowed the girl to consort with or to enter or continue in the employment of, any prostitute or person of known immoral character."

On the jury being asked their verdict the foreman said: "The man we find guilty of negligence with a recommendation to mercy, and the woman guilty of criminal neglect on all counts." *Radcliffe*, who defended the appellant, asked for judgment on that verdict, and *Parr*, who appeared for the Crown, said: "I think the verdict ought to be taken in the words of the section, and on the words of the indictment." The Recorder said: "Do you find that the man had the care of this child and caused or encouraged unlawful carnal knowledge? I don't think you ought to say simply neglect." The jury after further deliberation found a verdict of "Guilty of criminal neglect with a strong recommendation to mercy." The Recorder asked: "Do you mean to say having the custody of this daughter he, by his neglect, caused her unlawful carnal knowledge?" and the foreman assented.

J. E. Y. Radcliffe for the appellant (under s. 10 of the Criminal Appeal Act), who was not present, was not called upon.

T. H. Parr for the Crown. The basis of the prosecution was that the appellant knowingly allowed his daughter to consort with persons of known immoral character. Under s. 18 of the Children Act, 1908, a Court of summary jurisdiction can order a parent to enter into a recognizance to exercise due care and supervision in respect to a girl, who is, with the knowledge of that parent, exposed to the risk of seduction or prostitution. That shews that the Act was intended to place on parents the duty of exercising due care and supervision. [The Court stated that in their view s. 18 was intended to deal with a minor and different offence from that under s. 17.] There was ample evidence that the girl did, in fact, consort with bad characters, and that appellant was repeatedly warned of this in and since 1908, and knew it, and she has had a child. There was no evidence of the girl being out on any specific night when the appellant was at home, but he admitted that he took no steps beyond reproving the girl. The appellant's wife was constantly in drink, and, as the appellant

knew, often sent the girl to public-houses for drink. He is an engine-driver, and his work took him away at night during alternate weeks. Knowing his wife's habits he ought to have taken some steps. He could have applied under s. 59 of the Children Act, 1908, to a Court for an order that the child should be committed to the care of a relative or other fit person; I admit this would have been an extreme step to take. He could also have accepted the offer made by the Society for the Prevention of Cruelty to Children that they would take the girl into a home; or he might, as the Recorder suggested to the jury, have had some decent woman to look after the children when he was away. It is true he said he reproved her.

The case was put in the summing up as one of "criminal neglect," but the Recorder read the section to the jury and explained it to them; he only used the expression in connection with that explanation. I submit that it was proper to direct the jury that if they found the appellant had failed to use proper care they could convict him. The section must have been intended to meet cases where there was something less than active encouragement, for, if the parent actively assisted in the unlawful carnal knowledge, he could be convicted of aiding and abetting an offence under the Criminal Law Amendment Act, 1885, and the present section would therefore be unnecessary.

THE LORD CHIEF JUSTICE: The appellant in this case was charged with his wife with causing or encouraging the seduction, prostitution, or unlawful carnal knowledge of his daughter Lily, a girl under the age of sixteen years. The jury found the woman guilty: she was sentenced to eight months' imprisonment with hard labour, and she has not appealed. The jury at first found a verdict, with which I shall deal later, discriminating between the cases of the appellant and his wife; finally the verdict was taken as one of "guilty," and the appellant was sentenced to three months' imprisonment with hard labour.

The Children Act, 1908, s. 17 (1), provides that if a person has the care of a girl under sixteen years, and causes or encourages her seduction, prostitution, or (under the amending Act) her unlawful carnal knowledge, he shall be guilty of a misdemeanour. It appears to us that Parliament thought that as the words creating the offence were "causes or encourages," there might be a doubt

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whether the offence was committed if a man took no active steps. Therefore, Parliament passed sub-section (2). (His Lordship read the section.) The offence remains that of causing or encouraging unlawful carnal knowledge, but the proof of it is not then by any active step, but by reason of the fact that the girl consorted with prostitutes or persons of known immoral character, and it is sought to establish that the father knowingly allowed this. If it is established that the father knew it and stood by and allowed it he may be convicted of "causing or encouraging." There is a very important difference between allowing it and knowingly allowing it within the meaning of the section. That being the offence, it is necessary to see if there was any evidence to support it. It is unnecessary to travel through all the evidence, for we have heard from Mr. Parr on what the prosecution relied. It is enough for us to say that we are not satisfied that there was sufficient evidence on which the jury could be asked to find the appellant guilty.

The appellant has been an engine-driver for thirty years, and, of necessity, had often to be away at night. He had the misfortune to have as his second wife a woman of very drunken habits, who seems to have taken no steps whatever to discourage immorality in the daughters. It is said that though she was primarily responsible, the father can still be convicted because he omitted to do something. Darling J. asked what steps it was suggested he could have taken. When cases of this kind are considered, one must take into consideration the circumstances of the home. In this case we know what the home was like, and that the appellant was often away. There was further evidence that when his attention was called to the fact that the girl was talking to soldiers he called her in and rebuked her. There is no evidence that anything further happened on that occasion. It is suggested that he might have taken steps to have the girl committed to the care of some fit person under s. 59 of the Children Act, 1908; this was not pressed, although indicated as a possible course. It is obvious that no such facts were brought to his notice as would shew that the omission to do so amounted to "causing or encouraging." Then it is said that the lady superintendent of the Salisbury Diocesan Refuge had made an offer, and that the girl ought to have been given into her custody; she made the offer to the wife, but it does not appear that she ever made it to the appellant. Lastly, it is said that he ought to have got a woman to look after

this girl of fifteen, and that is said as proof of the offence, although the mother was already in the home; and it is contended that he could be convicted because he neglected to do so. The proposition has only to be stated to be refuted.

In our opinion there was no sufficient evidence on which the case could be submitted to the jury, certainly no sufficient evidence on which the appellant could be convicted, no sufficient evidence in proof of the crime. Further, we are not satisfied that the jury ever found a verdict which was meant to convict him. The foreman said that they found him guilty of negligence with a recommendation to mercy, and the woman guilty of criminal negligence; they drew the distinction. It would have been better to take the words in which they found their verdict; they distinguished between negligence and criminal negligence; there is a vital distinction between the two cases. Sect. 17 does not make it a criminal offence to neglect; you may have neglect which is not knowingly allowing the girl to consort with prostitutes or persons of known immoral character. The jury were not directed on this particular point, and do not appear to have found the appellant guilty. The Recorder finally said: "Do you mean to say, having the custody of this daughter, he by his neglect caused her unlawful carnal knowledge?" This was again confusing neglect and the offence defined in the sub-section. We are not satisfied that the jury ever meant to convict the appellant of causing or encouraging the unlawful carnal knowledge of his daughter. On these grounds we think the conviction must be quashed.

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Conviction quashed.

Solicitors for the Crown—*Church, Rackham & Co.*

A. L. B. T.

CHARLES SANDERS.

Severity of sentence mitigated in view of facts not before the Court of trial.

This was an appeal against sentence, by leave of Atkin J. Appellant was convicted of obtaining money by false pretences and larceny, on the 4th October, 1913, at the Barnstaple Borough

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Sessions, and was sentenced to five years' penal servitude on each indictment, the sentences to run concurrently.

Appellant, who was not present, was not represented by counsel.

Comyns Carr for the Crown. The main point raised by the appellant is that the police officer stated that he was last released from prison in May, 1912, whereas he was really released in September, 1911. He had been convicted several times before, and had two previous sentences of penal servitude.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to obtaining four shillings by false pretences, and was also convicted of stealing a bank book and one shilling's worth of postage stamps, and he was sentenced to five years' penal servitude on each indictment, the sentences to run concurrently. It is difficult in these cases to lay down a hard and fast rule, but a guide was indicated in *Connor*, 9 Crim. App. R. 131 (1913), where the view of the Court was that a sentence of penal servitude might be passed for a trifling offence if that offence was committed by a man with a bad record, shortly after his release from prison. I do not say that that rule is binding on the Court, but it is some guide. In this case it now appears that the appellant was released from serving his last sentence on the 4th September, 1911, a fact which was not apparent to the Deputy-Recorder at the trial. He had been out of prison for nearly two years. A letter has also been received from an employer for whom he worked during part of that time stating that the appellant was living a respectable life. All these facts were not present to the mind of the Deputy-Recorder who sentenced him. We must also bear in mind that his record is a bad one. But on the whole, the Court is of opinion that the sentence should be reduced to one of three years' penal servitude.

Sentence reduced.

A. L. B. T.

JOHN JAMES McKONE.

*Severity of sentence.**Proviso to s. 4 (1) of the Criminal Appeal Act, 1907, applied.*

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This was an appeal against conviction and sentence, by leave of Atkin J. Appellant was convicted of feloniously receiving stolen property, at the Sheffield City Sessions, on the 8th October, 1913, and was sentenced to three years' penal servitude.

V. B. Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant sold a coat which had been recently stolen, but Simpson, the witness for the prosecution, to whom he sold it; admitted that the appellant had told him it was not his coat, that he had got a key from a man in a public-house with which he opened the door of a house where the coat was, and that after the sale he had said, "I have promised to meet him, I should like to take him the money." In *Crowhurst*, 1 Car. & K. 370 (1844), Alderson B. directed the jury that where a man found in the possession of recently stolen property gives a reasonable account of how he came by it, it is incumbent on the prosecution to shew that that account is false. This direction was approved by Lord Denman C. J. in *Henry Smith*, 2 Car. & K. 207 (1845). Here the story was admitted to be true by the witness for the prosecution. Further, the Assistant-Recorder put the onus of proof entirely on the appellant. This was contrary to the judgment in *Stoddart*, 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612; 2 Cr. App. R. 215, at p. 242 (1909): "It seems to us that the jury should have been told that if they accepted the explanation given by and on behalf of Stoddart, or if that explanation raised in their minds a reasonable doubt as to his guilt, they should acquit him, as the onus of proof that he was guilty still lay upon the prosecution."

The sentence was excessive, for he was not a professional receiver, and it was clearly established that he could not have committed the burglary.

W. S. Meeke for the Crown.

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THE LORD CHIEF JUSTICE: The appellant was convicted of receiving a coat knowing it to have been stolen, and he was sentenced to three years' penal servitude. On the 4th September a warehouse was broken into and some clothing stolen; the appellant established his innocence of the burglary, but it was admitted that he took one Simpson to a house, unlocked the door, shewed him two coats, and sold him one for 4s. 6d., the value of which was 35s. 6d. It is true that Simpson under cross-examination made it clear that he knew that the appellant lived elsewhere. Simpson was a witness for the Crown, and counsel for the appellant argues that the *primâ facie* case against the appellant was rebutted, that the onus of proof was shifted, and that the onus lay on the Crown to shew that the story admitted by Simpson was not true. In these questions of onus it is desirable to be careful, but it is not necessary to use the words "burden of proof" so long as the jury are told that the prosecution have to satisfy them that the case is made out. We have come to the conclusion that there was ample evidence to support the conviction; the facts were not disputed, and the summing up, though open to criticism, does not do sufficient injustice to the appellant's case to justify us in quashing the conviction. Substantially the point was put to the jury, and, further, we think there was no miscarriage of justice, even if there was a mistake in the summing up. But we base our decision on the ground that the jury were in substance directed properly.

The sentence, we think, was too severe in the circumstances of the case and taking into account the record of the appellant. He has had various terms of imprisonment and one sentence of three years' penal servitude, of which he has still a considerable portion to serve, but we do not take the *remanet* into consideration. Bearing in mind the nature of the offence, we think the sentence must be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

JAMES CONNOR.

1913
3 November.*Severity of sentence.**An offence is aggravated by its commission after a recent release of the offender from prison.*Isaacs L.C.J.
Darling J.
Atkin J.

This was an appeal against sentence, by leave of Atkin, J. Appellant was convicted of larceny, at the West Riding Sessions, on the 13th October, 1913, and was sentenced to eighteen months' imprisonment with hard labour.

Appellant in person.

G. E. Cooke Yarborough for the Crown. The appellant has had nineteen convictions in the last twenty-five years, including seven for larceny. This offence was committed when he had only been out of prison for four days after serving a sentence of eight months' imprisonment for a similar offence.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to stealing a pair of boots of the value of 6s. 11d., which were hanging outside a shop. We have to bear in mind that this was his twentieth conviction, and that he had been released only a few days previously from serving a sentence of eight months for stealing trousers. We take that into account, but think that the sentence was too severe, and therefore reduce it to one of nine months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING,
MR. JUSTICE BRAY, MR. JUSTICE LUSH AND MR.
JUSTICE ATKIN.

JAMES YOUNG.

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On the allegation of being a habitual criminal, the onus is on the Crown to prove that the defendant "is leading persistently a dishonest or criminal life" and not on him to disprove it.

It is a misdirection in such a case to ask the jury to consider whether he has made up his mind to reform.

This was an appeal against sentence and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted of shop-breaking and of being a habitual criminal, on the 8th July, 1913, at the County of London Sessions, and was sentenced to three years' penal servitude and ten years' preventive detention. The appeal came before the Court, consisting of Bray, Avory and Lush JJ., on the 31st July, 1913, when the question of the latter sentence was considered to be of importance, and was ordered to be re-argued before a fuller Court, and the appellant was granted legal aid.

Purcell for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There was an interval of ten months from the time of the appellant's release from serving his last sentence to his arrest on the charge of house-breaking, and my ground of appeal against conviction is that the Deputy-Chairman misdirected the jury with regard to this interval. He said: "From that sentence he was released on the 19th July, 1912, and for the last ten months he has been out of prison. The real point you have to decide is, has he honestly made up his mind to lead a better life?" and in other passages stress is laid on the question whether the appellant had satisfied the jury that he had made up his mind to reform. This shifts the burden on the appellant

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to prove he was leading an honest life, whereas the proper question was whether the prosecution had shewn that in that interval the appellant had been living persistently a dishonest or criminal life. The only evidence offered by the Crown was the account given by the appellant to a detective of what he had been doing during that time. This is a stronger case than *Mitchell*, 7 Cr. App. R. 284; 76 J. P. 423; 28 T. L. R. 484 (1912), where the conviction was quashed on similar grounds (He was stopped by the Court.)

Dickens, K.C. (with him *W. A. Attenborough*) for the Crown. There was here a *primâ facie* case against the appellant, for the three convictions proved were all for similar offences to that of which he had just been convicted, and seven other convictions were also proved. There was also the evidence of the police, who asked the appellant what work he had been doing, and were told that he had been buying and selling in public-houses and elsewhere; but the appellant could not give them the name of a single person with whom, or of a place at which, he had dealt. The summing up only means that, there being this *primâ facie* case, the question was whether the appellant had done anything to displace it. It must be looked at as a whole, and the judge began by telling the jury clearly what they must find before convicting the appellant as a habitual criminal. In *Mitchell* there was evidence that the prisoner had done honest work for some months, and the mere omission to report to the police was held not to be enough to justify a conviction. Doing a little work is not enough to avoid a conviction: *Martin*, 7 Cr. App. R. (1912); the three convictions and the primary conviction may be sufficient of themselves to justify the conviction: *Waller*, [1910] 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. 400; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 142; 3 Cr. App. R. 213; in *Kelly*, 3 Cr. App. R. 248; 74 J. P. 167; 26 T. L. R. 196 (1909), the conviction was quashed on the ground that the summing up relied too much on the previous convictions, but they may be enough in a proper case. See also *Everitt*, 6 Cr. App. R. 267; 27 T. L. R. 570 (1911); and *Rowland*, 3 Cr. App. R. 277 (1909), which is very similar to the present case; *Heard*, 106 L. T. 304; 76 J. P. 232; 22 Cox C. C. 725; 28 T. L. R. 154; 7 Cr. App. R. 80 (1911); and *Condon*, 4

Cr. App. R. 109 (1910). Only the appellant could rebut the case set up by the Crown, and he did not even give evidence on his own behalf.

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THE LORD CHIEF JUSTICE: In this case the appellant was convicted of shop-breaking and of being a habitual criminal. The appeal which comes before us is based on misdirection by the Deputy-Chairman, and the substance of the complaint is that, whereas it is true that the facts as proved shewed that the appellant had been many times convicted, there was an interval of ten months between his release from serving his last sentence and his arrest on the charge of shop-breaking. The explanation given by him as to what he had been doing during that interval was that he had been going from house to house, and to public-houses, buying and selling goods, and so earning a precarious living. Against that no evidence was forthcoming, except the fact that that was all the appellant had said as to his life in that period. It may be that the Crown might have satisfied the burden of proof and established on those facts a *prima facie* case on which they could have asked the jury to find that the appellant was leading persistently a dishonest or criminal life, though there is much to be said against it, having regard to that interval. But we have come to the conclusion that in the direction which the Deputy-Chairman gave to the jury, he did not point out what, in our view, was the essential question, namely, whether the appellant was leading persistently a dishonest or criminal life, and was leading it at the time of his arrest (a). The fact that he had done so in the past was not enough.

In various passages in his summing up the Deputy-Chairman does indicate that it is for the jury to say whether the appellant had made up his mind to reform. That is wrong. It is not a matter of the burden of proof, but it is a question whether he rightly stated the law on the subject. We are all of the opinion that if the summing up had been in the paraphrase put forward by Mr. Dickens it would have been an admirable summing up; but it is not what the Deputy-Chairman said. Although at the end he went nearer to putting the matter on the right basis, we think the summing up must be considered unsatis-

(a) Cf. *Alfred Brown*, above, p. 161.

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factory. I would point out again, as I did in the course of the argument, that this is just the kind of case in which the Court has to be extremely careful to safeguard the prisoner. He is tried on a serious charge, convicted, and then indicted as a habitual criminal before the same jury and the same judge, and at that trial evidence is given of his previous conviction. Unless great care is taken this is very prejudicial to him, and while every credit must be given to the jury for wishing to be fair, it certainly predisposes them against him. If, as they must, they take the law from the judge at the trial, it is very important that he should explain it to them correctly, and it is necessary that he should point out what are the matters which it is essential for the Crown to prove in order to establish the case against the defendant.

In our view, the conviction as a habitual criminal and the sentence of ten years' preventive detention in this case must be quashed.

Conviction as habitual criminal quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING
AND MR. JUSTICE ATKIN.

FREDERICK ALBERT ROBERTSON.

1913
11 November.

Murder.

On an indictment for murder no overt act need be proved against the accused; circumstantial evidence may suffice.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 24th October, 1913, at the Central Criminal Court, before Lush J., and was sentenced to death.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the murder of one of his children, aged two years and three months, but the circumstances of the case were such that it was bound to come out in evidence that he was also charged with the murder of his other two children, who were twins, aged nine months. The facts were that on the 24th June the appellant's wife was removed to the infirmary, and for the next few days he tried to get the children taken care of, approaching in vain the relieving officer and the Salvation Army. On the 28th June he was alone with the children in the house; they were never seen alive again. He stated that they had been taken by the Salvation Army, but their dead bodies were found buried beneath the floor on the 25th July, being then in such a condition that it was impossible for the medical witnesses to say that they did not die a natural death; they could only say that the appearance of the bodies was consistent with the fact of the children having been smothered.

My first point is, that there was no evidence to go to the jury.

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I did not make a submission to this effect, because in *McCrae*, which is unreported, Kennedy J. ruled that where the corpse is putrefied the whole case must go to the jury [Northampton: *The Times*, Dec. 24 and 26, 1892]. Evidence that goes to the murder must be distinguished from that which goes to the burying of the bodies, which is itself a misdemeanour at common law: *Stephenson and another*, 13 Q. B. D. 331; 53 L. J. M. C. 176; 52 L. T. 267; 33 W. R. 44; 15 Cox C. C. 679; 49 J. P. 486; (1884); C. C. R.

In my address to the jury I put it as the very core of my defence that the burying alone could not be said to establish a case of murder. This defence was never put by the judge to the jury in his summing up; such a non-direction amounts to misdirection: *Dinnick*, 3 Cr. App. R. 77; 74 J. P. 32; 26 T. L. R. 74 (1909).

THE LORD CHIEF JUSTICE: Mr. Purchase has said all that could be said in support of this appeal, but in our opinion the appeal fails. The appellant was convicted of the murder of his daughter, aged two years and three months, and two grounds are put forward by Mr. Purchase in support of his appeal against this conviction. One is that there was not sufficient evidence, and the second that, he having taken a particular point, the judge did not in terms direct the jury's attention to it. In truth, the whole case turns on whether there was sufficient evidence to justify a conviction.

The facts are shortly as follows. On the 24th June the appellant, his wife and three children, that is, the girl whose death was the subject of this charge, and twins aged nine months, lived in a house in Saratoga Road with a Mr. and Mrs. Smith. Appellant and his family occupied the back room on the ground floor, and the Smiths the front room. The appellant's wife went to the infirmary, and no doubt there is evidence that the appellant tried to get the children into the workhouse, but without success. Mrs. Smith looked after the children for the rest of the week for 10s. On Saturday, the 28th June, the appellant told Mrs. Smith he would try to get the Salvation Army Home to take them; he went there but failed. It is clear that he tried to get the children taken off his hands legitimately. On the 28th June the children were put to bed by Mrs. Smith, and, following the instructions of

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the appellant, they were not undressed. They appeared quite well then. The appellant saw the Smiths between 7.30 and 8 p.m., when they went out, leaving the appellant alone in the house with the children. The Smiths came back at 11 p.m., when the appellant was in the kitchen. Mrs. Smith asked if the children had gone away, and he said they had taken the girl and were coming for the twins in the morning. At 9 a.m. on the following morning the appellant went into the Smiths' room; they asked if the Salvation Army had come for the twins and he said "Yes, at six o'clock." It is plain on the evidence that the statements that the children had been fetched were all fabrications. He told his wife that the Salvation Army were looking after the children, and he told the same story to another witness, a girl with whom he was on very friendly terms. Subsequently, on the 12th July, he left the house, and ten days later, another person having taken the rooms, a sickening odour was noticed, the police were called in, and the bodies of the children were found under the floor. The bodies were undoubtedly in a considerable state of decomposition, but identification was not impossible. Medical evidence established that the condition of the bodies was quite consistent with their having been smothered or suffocated in some way. These circumstances were before the jury, as well as statements made by the appellant to the police, the fact that he gave no evidence and offered no explanation how the three children who were left alone in the house with him had disappeared, and the fact that he had made a series of statements about the children which were fabrications.

It is argued that these facts do not amount to evidence on which a jury could convict. It could be argued that on these facts no other verdict was possible. The only possible suggestion is a series of coincidences; the jury are reasonable men, and we have to exercise our common sense and must take into account what inferences reasonable men would draw from the evidence.

There is only one other point. Mr. Purchase, making the most of the fact that the doctors were not able to say definitely that the children had been smothered, argued that the evidence might only point to a misdemeanour, and says that the judge ought to have called the specific attention of the jury to this argument, and that his failure to do so amounted to misdirection. We think it was an admirable summing up, and that everything was said that

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could be said in favour of the appellant. We were impressed by the great care with which every possible point in favour of the defence was put forward.

Application dismissed.

A. L. B. T.

ARTHUR HEWITT

On an indictment for perjury, materiality is to be tested by reference to the bearing of the impugned evidence on other evidence.
Tate, 12 Cox, C. C. 7 (1871), doubted.

This was an appeal against conviction, on the certificate of Bray J., who tried the case. Appellant was convicted of perjury, on the 15th October, 1913, at the Cambridge Assizes; sentence was postponed.

W. C. Bernard for the appellant, who was not in custody. The charge of perjury in this case arose from the evidence given by the appellant in proceedings taken against a Mrs. Richards under s. 6 of the Sale of Food and Drugs Act (38 & 39 Vict. c. 63), for selling an article of food which was not of the nature, substance, or quality of the article demanded by the purchaser. She was charged with selling margarine as butter, and stated that she bought it as butter from the appellant, whom she subpoenaed to give evidence on her behalf. In fact his evidence did not support her, and he was, by leave of the Court, treated as a hostile witness by the solicitor who appeared for Mrs. Richards. The two statements in his evidence on which perjury was assigned were: "I bought no butter in Wellingborough or margarine that I know of on Wednesday, the 20th August," and "I cannot account for the butter I supplied turning out to be margarine." I admit that the first statement was untrue and that the appellant did buy margarine on the 20th August, and after verdict I must accept that the second statement was untrue also.

My submission is that these statements were not material in the proceedings in which they were given in evidence. An analyst's certificate was put in before the magistrates, and by statute that

is "sufficient evidence, unless the analyst is given notice to attend for the purposes of cross-examination. Here it was not disputed by Mrs. Richards that the stuff was margarine, and it was no defence for Mrs. Richards to prove that she sold it in good faith, believing it to be butter: *Parker v. Alder*, [1899] 1 Q. B. 20; 68 L. J. Q. B. 7; 79 L. T. 381; 47 W. R. 142; 62 J. P. 772; 19 Cox C. C. 191; Div. Ct. Nothing that the appellant said in evidence therefore had the slightest bearing on whether Mrs. Richards was guilty or not, nor on the question of her *bona fides*; the substance of her husband's evidence was that he had bought the stuff from the appellant as butter; the appellant never contradicted that; he never suggested either that it was really butter or that she knew it to be margarine. It was suggested that his evidence involved a contradiction of what Mrs. Richards had said and so went to her credit; even if it did, what she herself had said was not material.

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[DARLING J.: Would not that evidence affect the penalty imposed?

Tate, 12 Cox C. C. 7 (1871), is authority that what goes to the *quantum* of punishment is not material. It was a case at Leves Assizes at which Cockburn L. C. J. said of the evidence: "It could not affect the fact of the assault, nor the legal liability to it, for it could afford no legal justification. At the utmost it could only suggest a provocation, which might afford some mitigation of punishment; but it could not affect the legal character of the act of assault or the legal liability for it. The prisoner, therefore, could not be convicted on this indictment, as the assignment of perjury was not legally material." It is true that in *Baker*, [1895] 1 Q. B. 797; 64 L. J. M. C. 177; 15 R. 346; 72 L. T. 631; 43 W. R. 654; C. C. R., there are dicta in the contrary direction, but *Tate* was not cited, no counsel appeared for the defendant, and the judgment really turned on a different question. In *Mullany*, L. & C. 593; 34 L. J. M. C. 111; 11 Jur. (N. S.) 492; 12 L. T. 549; 13 W. R. 726; 10 Cox C. C. 97 (1865), the perjury was committed after judgment was given and while the County Court judge was considering how the debt should be paid; it consisted in the defendant giving wrong Christian names, but that was rightly held to be material for, the summons being issued

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in the correct name, the judge struck out the cause. Such a construction of the words as that the appellant meant that he had sold butter was never suggested at the trial, and was not the view taken by the judge. The jury were not asked to decide what the words did mean; the judge directed them to consider the words material, holding that it was a question to be decided by this Court.

F. K. North for the Crown. What the appellant said was material, first, to the question whether Mrs. Richards was guilty or not. and, secondly, to the question what penalty should be imposed if she was guilty. While the analyst's certificate is "sufficient evidence," it is not conclusive evidence: *Hewitt v. Taylor*, [1896] 1 Q. B. 287; 65 L. J. M. C. 68; 74 L. T. 51; 44 W. R. 431; 18 Cox C. C. 226; 60 J. P. 311. It was open to Mrs. Richards to try to prove that what she sold was in fact butter. The appellant's evidence could only mean that he sold her nothing but butter. It is true that Mrs. Richards called him, expecting him to say that it was margarine, but the Court must look at his actual evidence, not at what he was expected to say. It was in issue whether what was analysed was butter or margarine, and whether it was what Mrs. Richards sold, for no admissions can be made in a criminal case. (He was stopped by the Court.)

Bernard in reply.

THE LORD CHIEF JUSTICE: The appellant in this case was convicted of perjury, before Bray J., and a question arose in the course of the case which he thought was one proper to be submitted to this Court; he therefore directed the jury to assume the law in such a way that a verdict of guilty was returned, and gave leave to appeal. The point is certainly one of some difficulty, but the particular questions in doubt are not necessary for the solution of this case. Once the case is clearly understood there is no further difficulty, and the Court is indebted to Mr. North for putting the matter so clearly. Mr. Bernard has put forward an ingenious argument, to which, I confess, the answer did not seem quite clear until we heard Mr. North. The whole question resolves itself into this: were the statements on which perjury was assigned material to the issue in the proceedings in which they were given in evidence? One statement was: "I bought no butter in Welling-

borough or margarine that I know of on Wednesday, the 20th August." The facts are clear. Mrs. Richards was summoned, under s. 6 of the Sale of Food and Drugs Act, for having sold margarine while purporting to sell butter. If it was the fact that she had done so, it was an offence under the Act. That was the fact in issue and the question which the magistrates had to decide. Although during the course of the case expressions may have been used which shewed that the defendant was not really disputing that what she sold was margarine, it certainly was an issue. When the statement of the appellant is examined, we agree that what he meant is not open to argument. It is clear that what he meant was that what he supplied was butter. The magistrates had certainly, according to the statute, *prima facie* evidence that it was margarine, but it was open to the defendant to bring evidence that what was stated on the analyst's certificate was not the fact. That was a matter which the magistrates were bound to take into consideration. When we have once come to the conclusion that the words mean that, and nothing else, it follows that the statements were material to the issue. The appeal therefore fails.

In reference to the case of *Tate*, which was tried on the Home Circuit at Lewes in 1871, before Cockburn L. C. J., there are some passages in his judgment as to which we will content ourselves by saying that we must not be taken to agree with the statement of the law as there laid down. We reserve our definite opinion to some other occasion when the point may arise.

Appeal dismissed.

Solicitor for the Appellant—*A. J. Lyon*, Cambridge.

A. L. B. T.

GEORGE LOWDEN.

Stamps purporting to be cancelled (and not only unused stamps) may be "forged" within s. 13 of the Stamp Duties Management Act, 1891.

This was an appeal against conviction, on a point of law. Appellant was convicted, at the Central Criminal Court, on the 10th October, 1913, before the Common Serjeant, of selling, &c. forged stamps, and was sentenced to three years' penal servitude.

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Eustace Fulton for the appellant, who was present. The appellant was convicted under s. 13 of the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), various counts of which charged him with selling forged postage stamps, exposing them for sale, and having them in his possession. There was another indictment against him charging him with obtaining money by false pretences, which is still on the file. What the appellant sold were cancelled £1 stamps for stamp collections, both the stamps and the obliteration being forged, and my submission is, that these were not stamps within the meaning of the Act. Sects. 3 to 8 of the Act deal with licences to sell stamps; this can only mean unused stamps; no licence is required to sell cancelled stamps. Sect. 9, again, which deals with a misused stamp, can only refer to an unused uncanceled stamp. There is nothing in s. 13 to suggest that the word "stamp" there has a different meaning. The statute must be looked at as a whole, and is one for the protection of the Revenue. It may be that in this case the obliteration was put on after the stamp was made, but even so there is no evidence that the appellant was ever in the possession of the stamps before the cancellation was added.

Bodkin and *Roland Oliver* for the Crown were not called upon.

THE LORD CHIEF JUSTICE: The argument of Mr. Fulton resolves itself into this, that that which was a stamp before cancellation is not so within the meaning of the Act after cancellation. That argument is more ingenious than sound, especially when the words of s. 13 are looked at. The whole section must be looked at and construed according to the ordinary meaning of the English language. There is nothing in the statute which would justify the Court in restricting the meaning of the word because of what appears in the previous sections. We must consider what was the intention of Parliament, which could have inserted words restricting the meaning, had it intended the meaning to be so restricted. The appeal therefore fails.

Appeal dismissed.

Solicitor for the Appellant—*S. Myers & Son.*

Solicitors for the Crown—*The Solicitors of the Inland Revenue.*

A. L. B. T.

OSCAR FIDLER.

*Incorrigible rogue—Severity of sentence.*1913
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Darling J.
Atkin J.

This was an appeal against conviction, by leave of Atkin J. Appellant was convicted, on the 19th September, 1913, of being an incorrigible rogue, and was sentenced, on the 15th October, at the County of London Sessions, to six months' imprisonment with hard labour, and to twelve strokes with the cat.

Appellant, who was not present, was not represented by counsel.

Comyns Carr for the Crown. The offence of which the appellant was convicted was failing to support his wife and children; he had been convicted many times of the same offence, the last time being on the 19th June, 1913: He was released from prison in July, since which date the family have never ceased to be chargeable. The Home Office has communicated with the Director of Public Prosecutions, and states that, without wishing in any way to interfere with the discretion of the Court, it is not inclined to be in favour of flogging for this class of offence.

THE LORD CHIEF JUSTICE: The appellant has not had much chance of providing for his family in the interval which elapsed since his last release from prison. In our view the sentence of six months' imprisonment with hard labour is sufficient in this case, and the sentence must be reduced by quashing that part of it which relates to the flogging and confining it to the imprisonment

Sentence of whipping set aside.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING,
MR. JUSTICE BRAY, MR. JUSTICE LUSH AND MR.
JUSTICE ATKIN.

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JOHN CROWLEY.

Habitual criminal—Severity of sentence.

This was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted of burglary and of being a habitual criminal, at the Somerset Sessions, holden at Wells, on the 15th October, 1913, and was sentenced to three years' penal servitude and ten years' preventive detention.

Purcell for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was released from serving his last sentence on the 15th April last, and was arrested on the charge of burglary in July. No reference was made in the summing up to this interval of three months, such as was held to be necessary in *Wells*, 5 Cr. App. R. 33 (1910) and *Kelly*, 26 T. L. R. 196; 74 J. P. 167; 3 Cr. App. R. 248 (1909), where there is a substantial interval. I must admit that there was evidence that the appellant was leading a dishonest life during the interval, so that a reference to it would probably not have been favourable to him.

As to sentence, s. 10 of the Prevention of Crime Act, 1908, provides that where a prisoner is convicted of being a habitual criminal, and the Court passes a sentence of penal servitude, "the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years," may sentence him to a term of preventive detention of

not less than five, nor more than ten, years. Such a sentence, therefore, does not necessarily follow conviction; the judge has first to exercise his discretion whether such a sentence is for the protection of the public; and, secondly, as to its term. Although it is true that the offender can earn release by shewing that he has reformed, to a man over fifty, such as the appellant, a sentence of (in all) thirteen years is not calculated to be an encouragement to reform. In *Hamilton*, 9 Cr. App. R. 89 (1913), the Court expressed the opinion that five years should be the normal sentence of preventive detention.

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JOHN
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Darling J.
Bray J.
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Atkin J.

[BRAY J.: I was a member of the Court in that case, and it was not intended to lay down any general rule.]

In *Franklin*, 74 J. P. 24; 54 S. J. 217; 3 Cr. App. R. 48 (1909), Alverstone L. C. J. said: "With regard to the ten years, we think that, under the circumstances, it is too long; and although the Home Secretary can interfere, and the Visiting Committee might deal with the matter frequently, yet the fact remains that, if the man does not behave properly, he would be in prison for thirteen years. We do not consider this a case for the maximum period of preventive detention. We think that ought to be reduced to one of five years."

[THE LORD CHIEF JUSTICE: That is a case of discretion. "Under the circumstances" are the governing words.]

This appellant's record is not as bad as that of *Franklin*. He has had twenty-seven convictions, but the offences did not involve combination or deliberation. Though it is suggested that preventive detention is reformatory, it is also undoubtedly punitive, and was alluded to in *Heron*, 9 Cr. App. R. 29 (1913), as a step towards "industrial serfdom."

Dickens, K.C. (with him *Comyns Carr*) for the Crown. The decision in *Hamilton* and custom have crystallised the sentences passed on habitual criminals into three years' penal servitude and five years' preventive detention. That is fettering the discretion of judges, and we are anxious to have a judgment that that is not the rule.

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[THE LORD CHIEF JUSTICE: We wish to make it quite clear that there is no rule, such as is supposed to have been laid down in *Hamilton*, that the sentence should be one of five years.]

We are also anxious to have a judgment which will shew what considerations should guide a tribunal in determining the length of sentence. The principles which I submit ought to be considered are, that preventive detention is not merely a punishment, but is intended for the protection of the public, is also largely reformatory, and that it depends on the prisoner himself whether he remains in detention for the whole period or not. Sect. 14 of the Prevention of Crime Act, 1908, provides for the release of prisoners on licence, so a sentence of ten years really means nothing. Although the Act only came into force in 1909, there have already been five cases in which the prisoner has been released at the end of eighteen months; three of these men had been sentenced to five years' preventive detention, the other two to longer periods. The question a judge has to consider is the chances of reformation; this it is almost impossible for him to gauge, and the burden of deciding it should be put on the prisoner by passing a long sentence, from which he can by his own conduct procure release. If a sentence of five years is passed it is a leap in the dark; if at the end of five years the prisoner is just beginning to reform, his release at that moment may undo all the good that has been done. I agree that the same applies at the end of ten years, and Parliament would have been well advised to pass the Bill in its original form, which provided for an indeterminate sentence. If a man is irreclaimable the public should be protected from him for as long as possible. Statistics shew that sentences have been passed according to no method or rule. Out of 183 cases a sentence of five years was passed in 144; and many of these cases were worse than those in which a longer term was imposed.

A great deal of trouble and care is taken in the endeavour to reform these prisoners. Rules have been made under the Act by the Secretary of State, and advisory committees have been formed, who give much time and attention to the matter. One member of the committee at least visits the prison every month, and every case is given careful personal attention.

THE LORD CHIEF JUSTICE: The Court is of the opinion that there is no reason for reducing the sentence in this case, but we will give judgment after hearing the next case. (See p. 203 below.)

Appeal dismissed.

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On the trial of the allegation of being a habitual criminal the jury should clearly be directed that the onus of proof is on the Crown, and their attention should be expressly directed to evidence tending to the conclusion that the defendant has been striving to lead an honest life in the period immediately preceding arrest.

A police officer, called for the Crown on this issue, is entitled to express his opinion on this point in the accused's favour.

A previous conviction of the accused, which has been quashed, ought not to be given in evidence.

There is no general rule that the term of preventive detention should be five years: Hamilton (above, p. 90), commented on.

This was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted of larceny from the person and of being a habitual criminal, at the County of London Sessions, on the 5th August, 1913, and was sentenced, by the Deputy-Chairman, to three years' penal servitude and ten years' preventive detention.

Purcell for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The interval since the appellant's last discharge from prison was seven weeks; there was no evidence of his behaving dishonestly in that period, and, in fact, a detective admitted that in his opinion the appellant had done his best. My appeal is based on misdirection and non-direction, or insufficient direction, on material points of considerable importance. The position of the appellant was made still more difficult by the fact that counsel for the Crown let the jury know that he had previously been convicted as a habitual criminal, and the conviction quashed on appeal [7 Cr. App. R. 269,

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1912]. The Deputy-Chairman said in his summing up: "What you have to decide is whether the prisoner was leading persistently a dishonest or criminal life, and the real test you have to apply is whether or not he made a genuine effort to turn over a new leaf. If you see any signs of that you will be very loth to find him a habitual criminal." In other places reference was again made to the question whether the appellant had decided to turn over a new leaf; such observations would be calculated to mislead the jury, and do not comply with the standard recently laid down by the Court as to the completeness and care required in directions to juries in these cases.

In *Waller*, [1910] 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. 400; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 142; 3 Cr. App. R. 213, it was laid down that the three statutory convictions alone may justify a conviction "in a proper case," but no guide is given as to what constitutes a proper case, beyond the fact that *Waller* was a coiner. In *Everitt*, 27 T. L. R. 570; 6 Cr. App. R. 267 (1911), more guidance was given. Pickford J. said: "Much depends on the nature of the offences; where an offence requires no preparation or deliberation, and there was no evidence of a system, probably the three convictions would not, without other evidence, be sufficient. But when they require deliberate and systematic planning, and are repeated at the earliest opportunity after release, they may be sufficient material for a jury to consider as evidence of an intention to live by crime alone." No direction was given to the jury in the light of these decisions as to the character of the appellant's convictions, nor as to his efforts during the interval since his last release from prison.

Beaufoi Moore for the Crown. The appellant has been convicted twenty times; six times for stealing, five for attempted stealing, and seven for frequenting, and I submit that the direction was ample to enable the jury to come to a correct decision on all the facts of the case. The admissions of the detective in the appellant's favour were before the jury, as was also the fact that his previous offences were of the same character as that of which they had just convicted him. In the summing up everything that was possible was said in favour of the appellant; reference was made to the fact that he had done some work since his last release, but this is not necessarily an answer to the charge of

being a habitual criminal: *Martin*, 7 Cr. App. R. 227 (1912); though it was evidence on which the jury might have refused to convict. His previous conviction as a habitual criminal was one which the prosecution was entitled to prove, and the fact that it was quashed was in his favour. If the mention of it was improper, the Deputy-Chairman did all in his power to minimise the effect of it.

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*THE LORD CHIEF JUSTICE: The Court proposes to give judgment in the particular cases of *Crowley* [above, p. 198] and *Sullivan*, dealing with each of them upon the arguments which have been addressed to the Court before it makes any observation with reference to the general policy of the Act, upon which we have had such a very useful and valuable argument, I may say, from Mr. Dickens.

With reference to *Crowley's* case, which was argued first, the appellant pleaded guilty to burglary; he was convicted of being a habitual criminal, and sentenced to three years' penal servitude and then ten years' preventive detention. He appealed against the sentence on his conviction as a habitual criminal. It is plain from his record that he was convicted fifteen times in addition to a number of minor offences for drunkenness, to which I do not refer further. His sentences include three terms of penal servitude: he was last released from prison in April of this year, and was not out of prison four months when he committed the burglary in question at the Rectory, Newton St. Loe, Somerset. The only question we are concerned with is whether the sentence of ten years' preventive detention should stand or should be reduced. The summing up was one which, although short, was, at any rate, to the point, and we see no reason why the learned judge was not entitled to exercise his discretion by passing a sentence of ten years' preventive detention in a case in which he thought it was right, and a case in which the record of the prisoner before the Court fully justified such a sentence being passed. Therefore, this appeal must be dismissed and the sentence must stand.

In reference to *Sullivan's* case, the appellant *Sullivan* pleaded guilty to a count in an indictment which charged him with larceny

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from the person. He was convicted of being a habitual criminal, and he was sentenced to three years' penal servitude, and also, as in the last case, to ten years' preventive detention. He appeals against the sentence, and it is with that appeal that we now have to deal. He pleaded guilty to larceny, and what we have to consider now is whether the conviction as a habitual criminal and the sentence passed is justified, and, in particular, whether the sentence of ten years' preventive detention was a right sentence.

Now I do not wish to repeat what was said by this Court, I think only a week ago [above, p. 188], when we laid down that it was necessary in the interests of the prisoner that very watchful care should be exercised by this Court and also by those who preside over trials in which a prisoner is charged with being a habitual criminal, to see that the prisoner's interests are jealously safeguarded, because, as we have already said in a previous judgment in this Court, he stands in a peculiar position, which is, to say the least of it, not a favourable one, when the trial of the particular matter takes place before the jury; that is to say, he is first of all convicted of the offence for which he is indicted, then he is put upon his trial as a habitual criminal, and, consequently, it is enough to say that one must be scrupulously careful to protect him when this particular question whether he is a habitual criminal or not is being put to that same jury. This Court has already said it must take care to see there is a proper direction to the jury, and that they think the direction in the case is a right one.

Now in view of the special matters which arise on this conviction, it has been argued before us that there was first of all a misdirection, inasmuch as the tendency of the summing up (I do not think it can be put higher than that) was to place the burthen upon the prisoner of establishing that he had made up his mind to turn over a new leaf and lead an honest life for the future. There is a further ground of appeal on the ground of non-direction, inasmuch as the presiding judge did not point out to the jury the strength of the evidence given by the prosecution in respect of seven weeks during which the prisoner had been out of prison that is, between the time of his liberation and the time of the arrest for the particular crime with which he was then charged; that that evidence proved the attempts which the pri-

soner had been making during those seven weeks to lead an honest life. It is further said that there was a mention of the previous conviction of this prisoner as a habitual criminal in that same Court and before the same judge which had been quashed on appeal to this Court. That, unfortunately, we think, was elicited in the course of the case; it is sufficient to say that is made one of the grounds on which it is said this trial is not a satisfactory one, and that this conviction ought not to stand. It is further urged that in the summing up the learned judge pointed out that, in reference to the opinion of the officer Fitzgerald, who had given this strong evidence of the attempts made by the prisoner to lead an honest life and expressed his conviction that this man was attempting to lead an honest life during the seven weeks he was free, the Deputy-Chairman says, "it is not for him" (that is, for officer Fitzgerald) "to judge this case. It is the opinion of the officer that he has made an honest effort to turn over a new leaf, but you need not accept his belief, it is not his business to have a belief. From the facts that have come under his notice that is the opinion he has formed, and you will be justified in taking that into consideration in forming your own conclusion." Now the view this Court has formed is, that taking all the circumstances of this trial into account, having reference in particular to the four grounds upon which it has been argued that this conviction ought not to stand, we come to the conclusion that although we do not say that any one of these four grounds would have been sufficient in itself to justify us in quashing the conviction and induce us to come to the conclusion that the trial was unsatisfactory as a whole, yet we are of opinion that taking the circumstances into account and bearing in mind these four points, we do come to the conclusion that this has not been a satisfactory trial, and we are not satisfied that if the jury had had the case put before them, especially in reference to these four points, in the way in which we think it should have been put, they would have come to the conclusion that this man was persistently leading a dishonest and criminal life, and for this reason we think the conviction as a habitual criminal must be quashed.

Having regard to the view of the Court in reference to the mention of the previous conviction it is enough to say, especially having regard to the jealous care with which the interest of

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prisoners must be watched, that the mere mention of a previous conviction of this man as a habitual criminal before the jury which has just convicted him of an offence of larceny, and when they are trying him for being a habitual criminal, might seriously prejudice their view. In any event, it is not safe to conclude that any direction by the judge, however strong in respect of this particular matter, would be sufficient to wipe out from the jury's mind that the prisoner had been previously convicted of being a habitual criminal, though we do not say that when a mistake has been made and the judge has told the jury the matter must not be taken into account at all, that would be sufficient to induce us to quash the conviction. Though we do not by any means say that, we say this fact, taken into consideration with the other facts, forms a powerful reason for the conclusion that this conviction cannot stand.

With regard to detective Fitzgerald and the belief he expressed, it must be borne in mind that in these trials evidence of character and repute may, if the Court think fit, be admitted as evidence on the question whether or not the accused is leading persistently a dishonest life; and without formulating any rule of law, because that is unnecessary, we are not satisfied with the Deputy-Chairman's direction that it was a matter upon which the officer had no business to express his belief.

With reference to the general question which has been raised, I desire to express the opinion of the Court so that there may be, so far as the Court thinks there can be, guidance in dealing with these cases in the future.

I must point out that all we are entitled to do is to express our opinion of the meaning of the words which are in the Act of Parliament. Those words are that the Court in dealing with these cases in which a prisoner is convicted on indictment of crime and is then found by the jury to be a habitual criminal, and has received a sentence of penal servitude, may pass a further sentence, ordering that, on the determination of penal servitude, the prisoner be detained for such period not exceeding ten years nor less than five years as the Court may determine, and the question involved in the argument to us is as to the meaning of those words, for such period not exceeding ten years nor less than five. It is said to be thought that a rule has been laid down by this Court in the case of *Herbert Hamilton*, 9 Cr. App. R. 90 (above),

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that in the absence of special circumstances the Court should impose a term of five years' preventive detention in cases where there was nothing in the case that made it worse than others; that that was to be the sentence passed. It is sufficient for us to say that it was not the intention of the Court to lay down any rule of law which was subsequently to bind judges in passing sentence of preventive detention. All that was intended was to deal with that particular case, and it said, in the absence of circumstances which made it desirable to pass a sentence of more than five years, that is to say, some special circumstance which made it necessary to pass the severest sentence or a severer sentence than five years, that a term of five years was enough; but in the opinion of this Court it would be just as wrong to say that this statute is to be interpreted as laying down the rule that five years are to be the term unless there are special circumstances when it may be increased, as that ten years must be the sentence unless there are special circumstances when it may be reduced. Neither of those rules would be correct. They are not the rules laid down by this Court. What this Court says is that in order to arrive at the proper term of years of preventive detention to be imposed, once the Court has come to the conclusion that some term should be imposed, because it is for the Court to come to that conclusion, what the judge has to determine and take into account in the exercise of his discretion is all the circumstances of the case. He may impose a period of five years; he cannot impose a period exceeding ten years; it is for him to determine, having regard to all the special circumstances of the case before him, what sentence within those limits he will pass. It is, however, of importance that judges in passing this sentence should bear in mind the policy of the Act. No doubt the sentence of preventive detention must be punitive; it deprives a man of his liberty and imposes upon him against his will restrictions and rules of life which are only possible if he has committed an offence which justifies their imposition; and then, according to the view of the Legislature, he may be sentenced to this term of preventive detention; but it is not to rank in the same way as imprisonment; it is not intended to be the same as imprisonment, and certainly is not the same as penal servitude, because the most casual reference to the rules will shew that there are very special rules which have been framed

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in accordance with this statute dealing with these cases of preventive detention. Separating the detention into three grades and giving special privileges, assuming that a man conducts himself properly, allowing a man to be employed at useful trades in which he may earn money, and giving power for part of that money to be applied for the benefit of his family; allowing canteens to be opened at which prisoners may purchase articles of food at prices to be fixed by the directors; allowing prisoners of the ordinary grade to associate at meal times, and allowing those in the special grade after getting their second certificate to associate at meal times and in the evening; and also giving them such relaxation of a literary and social character as may be prescribed from time to time; and, further, advice and counsel will be given to them. There is a Board of Visitors appointed by the Secretary of State who hold office for three years, which has the power of doing much good and useful work; we have had brought before us the work of one Board, consisting of Sir Edward Clayton, Sir Douglas Straight and Sir Bryan Donkin, who have been doing work most useful to the State, and doing their utmost under this Act to carry out the duties which they are allowed to perform by virtue of the rules made under this Act of Parliament. We call attention to these rules and the work done under them for the purpose in particular of drawing the attention of those who have to pass sentence of preventive detention to what may happen under these sentences, assuming that a prisoner conducts himself during this period of preventive detention properly and well. If he shews that he has become a reformed character, not only does he get the benefit of the increased privileges as he passes from one grade to the other during the term, but he is allowed out by the order of the Secretary of State. There is the fullest power given to the Secretary of State to deal with the matter, and a man will be kept in preventive detention only for the period of five years, or it may be ten years according to his sentence, if it is clear that during that period he has not become a reformed character; we have had our attention called to cases in which a man has been released after one year, certainly after eighteen months; but it is too early to say yet what the effect will be of these releases, because the Act of Parliament has only been in force such a very short time, and it is as well to point out that this is the first opportunity this Court of Criminal Appeal has had of considering

generally the work done under the Act, since there must be first of all the imposition of three years' penal servitude before there can be a term of preventive detention; the sentence of preventive detention actually served must have been very very short indeed, for not more than two years can have been served. In the circumstances it is sufficient for us to say that we think all these matters should be taken into consideration by the judge when he has to determine what term of years of preventive detention there shall be; he should take into account the special circumstances of the case and the intention of the Act that this term should be not only punitive but reformatory. We want to make it quite plain that our view is that it is entirely discretionary for the judge who presides at the trial, having regard to the Act which he is called upon to enforce, and applying it to the particular circumstances of the case then before him, to determine the period of preventive detention.

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Conviction as habitual criminal quashed.

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BEFORE

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AND MR. JUSTICE ATKIN.

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MOSES PRITCHARD AND MARY JANE PRITCHARD.

On a joint indictment for receiving stolen property, the evidence of the guilty knowledge of each defendant must be carefully distinguished in the summing up.

These were appeals against conviction, and an appeal by the female prisoner against sentence. Appellants were convicted, on the 9th October, 1913, at the Montgomery County Sessions, of receiving five sacks of meal and six and a-half sacks of flour, and were sentenced to twelve months' and six months' imprisonment with hard labour respectively.

Trevor Lloyd for the appellants (under s. 10 of the Criminal Appeal Act), who were present. While on a journey along the Shropshire Union Canal one of the crew of a canal boat stole a number of sacks of meal and flour from a warehouse on the bank. Appellants were husband and wife. Mary Jane Pritchard, in the absence of her husband, bought the sacks of meal and flour, the subject of the charge, for £1 from a boatman named Frederick Wood, who pleaded guilty to the larceny, and was a witness for the Crown, and who, by her direction, placed them on the premises occupied by her husband. Two days later Moses Pritchard returned home, and was told by his wife that the sacks were there, and that they had been brought by a boatman. On the day of his return, or the next day, he knew of the larceny.

About a week later the police came to the appellants' house to make inquiry, when, his demeanour causing suspicion, a search was made and the sacks found in a locked room. It is submitted that there is no evidence upon which the female appellant ought

to have been convicted, for it is only that of the thief and the fact that the stolen property was found upon her husband's premises. With regard to the male appellant, the evidence was not sufficient in law to support the conviction: *Pratt* (1865), 4 F. & F. 315; *Robinson* (1865), 4 F. & F. 43. The Chairman's direction to the jury was wrong.

Artemus Jones, for the Crown, could not support the direction as to the law, but no material injustice was done, as the Chairman had gone on to say: "Two people received part of this property; the question is whether they received it honestly, as they both say, and that they had no idea it was stolen. Well, you have to weigh the evidence of the prosecution and the defence of the prisoners and come to your conclusion from that evidence." He pointed out that *Dring* (1857), 7 Cox C. C. 382; *Dears. & B.* 229; 3 Jur. N. S. 1132; 6 W. R. 41; C. C. R., and *Woodward* (1862), L. & C. 122; 31 L. J. M. C. 91; 8 Jur. N. S. 104; 5 L. T. 686; 10 W. R. 298; 9 Cox C. C. 95; C. C. R., were cited in the hearing of the jury and correctly set out the law.

[ATKIN J.: The Chairman in directing the jury, "Two people received part of the property," did not leave to the jury whether the husband's conduct amounted to receiving or not.]

[THE LORD CHIEF JUSTICE: The Chairman said, "Pritchard and his wife say they received it." What is the evidence of that? The Chairman treats the cases of the husband and wife as the same. They should have been distinguished.]

THE LORD CHIEF JUSTICE: It is submitted to us that there is not enough evidence against the woman, but we cannot accept that view. We think there was ample evidence. The case of the man is different. He was away from home when the sacks were received by his wife, and there was no evidence of any arrangement with him by which they were to be received in his absence. The Chairman in summing up to the jury said: "I think that immediately it came to the husband's knowledge that this property, was there, which he knew to be stolen property, he is equally guilty with his wife." This is contrary to *Dring's* case. The Chairman stated as facts propositions which were for the jury to deter-

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mine. He took the case out of their hands; therefore we think the conviction of Moses Pritchard must be quashed. The woman's sentence runs from the date of conviction.

Conviction of one appellant quashed.

C. St. J. W. N.

LEWIS BAUMGARTEN.

Severity of consecutive sentence.

This was an appeal against consecutive sentences of twelve months' hard labour as an incorrigible rogue and three years' penal servitude for burglary, passed at the Surrey Sessions, on October 14th, 1913.

R. E. Otter for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

T. Landers for the Crown. The appellant pleaded guilty to burglary, at Kingston Sessions, and was sentenced for this offence to three years' penal servitude. He was at the same time sentenced as an incorrigible rogue to twelve months' imprisonment with hard labour for having returned several times after being deported as an undesirable alien. The sentences were to be consecutive. The Chairman at first stated that they were to be concurrent, but on being informed by the officer of the Court that this could not be done, he ordered the sentences to be consecutive.

The Court called upon counsel to address himself to the cases on this point. Counsel referred to *Jones*, 1 Cr. App. R. 196 (1908); *Martin*, 1 Cr. App. R. 209 (1908); and *Islip*, 3 Cr. App. R. 96 (1909), as shewing that there was no objection in law to sentences of hard labour and penal servitude being concurrent. If the Court desired to reduce the sentence of penal servitude, the Public Prosecutor would not seek to influence the Court against taking that course, but he deemed it advisable in the public interest that the sentence of twelve months' imprisonment with hard labour should be allowed to stand, as a rigorous enforcement

of the penalty for disobedience was the only effectual means of securing the proper carrying out of an expulsion order.

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THE LORD CHIEF JUSTICE: The Court which tried the prisoner passed the sentence of penal servitude for the burglary to follow the hard labour, because it had been led to believe that it had no power to make these sentences concurrent. But the cases cited and the case of *Bruce*, 5 Cr. App. R. 213, 233, (1910) shew that this is not so. The sentence of twelve months' hard labour will stand, but the sentence of penal servitude will be quashed, and nine months' imprisonment with hard labour will be substituted, the sentences to be consecutive, so that the appellant will have to serve a sentence of twenty-one months in all.

Sentence reduced.

C. St. J. W. N.

ALBERT PORTER.

Sentence mitigated in view of appellant's reparation for offences and apparent determination to reform.

This was an appeal against sentence. Appellant pleaded guilty, on 11th October, 1913, at Glamorgan Sessions, Swansea, to larcenies, and was sentenced to two concurrent terms of three years' penal servitude.

The appellant was present, and was not represented.

Comyns Carr for the Crown.

THE LORD CHIEF JUSTICE: It is clear from the facts that the appellant committed a serious larceny, and the Court would not have interfered if it had not been shewn to us, both by letters from the Salvation Army addressed to the proper quarter, the Home Office, and from the prosecutor, that the conviction was the result of a statement made by the appellant himself, in which he gave information which led to the restoration of the property. If a man shews a genuine intention to repent and enables justice to be done by affording a means for the restoration of stolen property,

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account of it should be taken in the sentence. The Court has been greatly assisted by the facts brought to our knowledge by the Salvation Army, and we give the appellant credit for an intention to lead a better life. The sentence will be reduced to one of six months' imprisonment with hard labour.

Sentence reduced.

C. St. J. W. N.

THOMAS KEATS.

Severity of sentence.

This was an appeal against sentence. Appellant was convicted of incest, at the Dorchester Assizes, on October 17th, 1913, before Phillimore J., and was sentenced to seven years' penal servitude.

Appellant was not present, and was not represented.

Cecil Fitch, for the Crown, pointed out that the jury's finding at the trial appeared in the shorthand note to be ambiguous, but was intended in the appellant's favour.

THE LORD CHIEF JUSTICE: In this case it is unnecessary to go at length into the facts, but having regard to the overcrowded state of the appellant's home and the squalid conditions in which he lived, the Court will reduce the sentence from seven years' to three years' penal servitude.

Sentence reduced.

C. St. J. W. N.

HENRY JAMES MURCH.

Severity of sentence—The Court may consider evidence of character not given at the trial.

This was an appeal against sentence. Appellant was convicted, on the 17th October, 1913, at the Bedford Assizes, before

Rowlatt J., for fraudulent conversion, and sentenced to three years' penal servitude.

H. Russel for the Crown.

The appellant was not represented, but handed to the Court various testimonials to character which had not been before the Court at the time of the trial.

THE LORD CHIEF JUSTICE: We have had an opportunity of consulting the judge who tried the case, and think the sentence should be reduced to eighteen months' hard labour.

Sentence reduced.

C. St. J. W. N.

JOHN DICKINSON AND JOHN MOORE.

Severity of sentence on prisoners serving another term.

These were appeals against sentence. The appellants were convicted, on the 15th October, 1913, at the Staffordshire Sessions, for receiving stolen property, and sentenced to three years' penal servitude.

Appellants were present, and were not represented.

M. V. Pollock for the Crown.

THE LORD CHIEF JUSTICE: We are of opinion that there is ample evidence that the convictions are right. The prisoners at the trial were brought up from prison, where they were serving sentences for another burglary. They were charged in the present case with burglary, but only convicted of receiving stolen property. We think the sentences are too severe in the circumstances, and reduce them to twelve months' imprisonment with hard labour in each case.

Sentence reduced.

C. St. J. W. N.

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ERNEST FOREMAN.

Isaacs L.C.J. *On the trial of an indictment for receiving stolen property, the evidence of possession by the accused must be clear.*
Darling J.
Atkin J.

This was an appeal against conviction on the certificate of the learned Recorder who tried the case. Appellant was convicted, on the 17th November, 1913, at the Croydon Borough Sessions, of receiving stolen property, and sentence was postponed.

A packing case containing aluminium goods was stolen from the premises of the Parcels Delivery Company at Croydon by the unauthorised use of an advice note, and was subsequently found by the police in a room of a flat occupied by the appellant. The flat contained three rooms. The room in which the property was found was let by the appellant to another man, who, according to the defendant, kept his door locked. It seems that the advice note had come into the possession of the persons who obtained the packing case from the Delivery Company through being wrongly addressed to an address similar to that of the shop where the appellant worked.

C. G. Moran for the appellant (under s. 10 of the Criminal Appeal Act), who was on bail, was not called on.

[THE LORD CHIEF JUSTICE: What evidence is there that the goods were ever in the possession or control of the prisoner?]

R. S. Otter for the Crown. There was the evidence of a woman who saw two men take the packing case to the appellant's flat; also the evidence of a police constable that the appellant had admitted that the flat was his, and that the thief came there occasionally. I submit there is a sufficient *primâ facie* case for the jury.

THE LORD CHIEF JUSTICE: We do not say that if stolen goods are found in a house it is not evidence in some cases that they are in the possession of the occupier, but we think in this case, having

regard to all the circumstances, there is not sufficient evidence to convict. We are the more ready to come to this conclusion because the learned Recorder was clearly very doubtful whether an offence had been committed.

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Conviction quashed.

C. St. J. W. N.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND
MR. JUSTICE LUSH.

GEORGE HARTLEY.

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In a proper case the Court will extend the time for making an application for leave to appeal.

This was an application for leave to appeal against sentence, which had been refused by Atkin J. Applicant was convicted and was sentenced to six years' penal servitude. He was not present.

BRAY J.: This application is out of time, but it is not the practice of this Court to adhere strictly to the rule in such a case. The Court will look into all the circumstances. Here the prisoner has a particularly bad record, and we see no reason to interfere.

Application refused.

O. ST. J. W. N.

PETER NEILSON.

Unless notice has been given to the defendant, evidence that he is the associate of thieves cannot be given to prove that he is a habitual criminal.

Maxfield, 28 T. L. R. 404; 7 Cr. App. R. 230 (1912), followed (a).

Appellant was convicted of larceny of a bicycle and of being a habitual criminal, at the Lincolnshire (Lindsey) Sessions, on 17th October, 1913, and was sentenced to three years' penal ser-

(a) This case was not cited.

itude and five years' preventive detention. Atkin J. had refused leave to appeal against the former conviction, but had granted it as to the latter. There was also an appeal against sentence.

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Disney for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appeal was on the ground that evidence had been admitted of a fact which was not mentioned among the grounds in the notice of intention to indict the appellant as being a habitual criminal. The evidence in question was that the appellant had been constantly associated with a well-known thief since his last release from prison.

N. Anderson for the Crown. The rule is that you must state the grounds of the charge, but it is not necessary to give notice of the evidence which it is intended to give to support them. One of the grounds here was "that after your last release from prison a berth was found for you in two ships in turn, but you refused to go to sea in either of them." The prisoner might have said that he was justified in refusing. The question for the jury was whether there was a genuine refusal. The evidence that he was an associate of a well-known thief at a time when efforts were being made to procure employment for him was to shew that his refusal was not genuine.

[The LORD CHIEF JUSTICE: Such a charge should be a ground specially mentioned in the notice. He should have had full notice if it was intended to charge him with being an associate of thieves.]

Further, there has been no substantial injustice.

The LORD CHIEF JUSTICE: The appellant here was convicted of being a habitual criminal. The Court is of opinion that the evidence that he was an associate of a well-known thief, called Cash, was wrongly admitted. We think that, if the intention was to make this specific charge, notice should have been given to him. That is sufficient to vitiate the conviction. We cannot say that the wrongful admission of this evidence had no effect upon the jury, for the Chairman, in summing up the case to them, says: "How has he employed his time? The police officer swears he saw him in the company of a convicted thief." Before that, he

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said, "He came out on licence in February this year, and what does he do? He seems to go to Doncaster, and is found loitering in the streets, and if the police constable had been allowed to go on, he might have let out some awkward things."

The conviction as a habitual criminal must be quashed, and with it the sentence of five years' preventive imprisonment. The sentence of three years' penal servitude for the larceny stands.

Conviction as habitual criminal quashed.

C. ST. J. W. N.

JOSEPH LOMAS.

Mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact: there must be some particular crime in view.

This was an appeal against conviction on the certificate of Rowlatt J., and an application for leave to appeal against sentence. Appellant was convicted of housebreaking, at the Warwick Assizes, on the 7th November, 1913, and was sentenced to eighteen months' imprisonment with hard labour.

A burglary was committed by a man named King, who had used for the purpose a housebreaking implement known as a jemmy, and was convicted as a principal. It appears that on the day on which the burglary was committed the jemmy was in possession of the appellant, who originally received it from King. At King's request he returned it to him, and subsequently, after the burglary had been committed, received it again, together with the sum of 2*d*. Appellant, who was indicted as an accessory before the fact, was charged with King with housebreaking.

The jury found: "Lomas guilty: that he had a certain knowledge that the jemmy was wanted for an illegal purpose—that he handed the jemmy to King with the knowledge that it was wanted for a burglary. He did not know that it was wanted for this particular burglary."

Rigby for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

R. A. Willes for the Crown was called on by the Court. There is no direct authority that a person may be an accessory before the fact, except when he counsels, aids, or abets the commission of the crime. But it is submitted that if appellant handed the jemmy to King with the knowledge and intention that it was to be used for a burglary, he would be guilty of being accessory before the fact: *Bernard*, 1 F. & F. 240 (1858). In the present case burglary was the direct object.

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[The LORD CHIEF JUSTICE: The effect of that case is that there must be something in the nature of advice, or procuring the commission of the offence. It is not enough if the person charged merely knew of the intention of another to commit it.]

I submit that knowledge, coupled with assistance, is enough to constitute a person an accessory: *Fretwell* (1862), L. & C. 161; 31 L. J. (M. C.) 145; 8 Jur. N. S. 466; 6 L. T. 333; 10 W. R. 545; 9 Cox, C. C. 152. Here the assistance was handing the jemmy to the man King, and from the nature of the implement the appellant must have known it was intended to commit a burglary.

[BRAY J.: It was King's own jemmy, which the prisoner had been taking care of.]

[LUSH J.: If the verdict merely means that the appellant handed King's jemmy to him with the knowledge that he would commit some burglary with it, it is not enough.]

The verdict is a special one—a finding of the facts, and not a verdict of guilty, followed by a rider. You have a finding that the appellant had knowledge and gave assistance. I submit that is sufficient to support the conviction.

The LORD CHIEF JUSTICE, after stating the facts as set out above: The verdict of the jury is admitted to be a special verdict. The question is, do the facts found by the jury in their verdict shew that the appellant was an accessory before the fact to the commission of this burglary? It has been argued by Mr. Willes with great clearness that an accessory is one who gives assistance

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with the knowledge that a crime is to be committed. Here the finding is not enough to bring the case even within that statement of the law. We do not say that we agree with it as a definition of an accessory before the fact, but it is sufficient for us to say that the facts as found by the jury are not enough to constitute the offence.

Conviction quashed.

C. ST. J. W. N.

KENNETH BURKE.

Rectification of sentence passed under a mistake of fact.

This was an appeal against sentence by leave of Atkin J. Appellant was convicted of attempted larceny, at the London County Sessions, on 21st October, 1913, and sentenced to two years' detention under the Borstal system.

Schultess Young for the Crown. The appellant and his mother, who were desirous that he should be sent to Borstal, misled the Court as to his age. It has been now found that the prisoner is over twenty-one years of age, and is, therefore, ineligible for punishment under the Borstal system.

The LORD CHIEF JUSTICE: The sentence must be varied to one of four months' imprisonment with hard labour.

Sentence reduced and varied.

C. ST. J. W. N.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND
MR. JUSTICE LUSH.

MORTIMER DENT.

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Severity of sentence.

To impose the same sentence on co-defendants guilty in different degrees is not necessarily improper.

This was an application for leave to appeal against conviction and sentence. Appellant was convicted of occasioning actual bodily harm, at the County of London Sessions, on the 28th October, 1913, and was sentenced to twelve months' imprisonment with hard labour.

Abinger for the appellant, who was not present. The appellant was the manager of premises in the Strand at which "mock auctions" are held, and he was indicted with two of his assistants for inflicting grievous bodily harm on one McNichol, and by a second count for occasioning actual bodily harm to him. He was convicted on the second count. The evidence shewed that the prosecutor came to the appellant's premises to create a disturbance, and that he said he would not allow the business there to be carried on until he was given some change which he alleged was due to him. He was therefore a trespasser, and the defendants were entitled to turn him out. The blow which caused the injury was inflicted by one of the other prisoners, and the jury should have been told that, although the appellant authorised some injuries, he was not responsible for all that were inflicted. The judge also misdirected the jury in telling them that the natural consequence of a blow on the nose was to break it.

The sentence was excessive. The appellant bore an excellent character, but he received the same sentence as Jacobs, the assistant

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who was convicted on the more serious charge, and who had been convicted many times previously.

The LORD CHIEF JUSTICE: The appellant was charged, together with two men named O'Leary and Jacobs, with being concerned in an assault committed on the prosecutor in an auction room in the Strand, of which the appellant was manager. It appears that the prosecutor went to the room and made some purchases, for which he paid. He then bought a knife for twopence, and having exhausted his small change tendered a sovereign in payment. He expected to get 19s. 10d. change, but did not get it. He complained to the police, and on the next day went to the room, demanded his money, and created a disturbance. In the disturbance it was evidently intended to get rid of the prosecutor by means of very considerable violence. When he demanded his change the appellant ordered O'Leary to close the doors. The prosecutor says that the appellant struck him, and an independent witness named Miss Carroll corroborates this. She also says that the appellant called out "Punch him," and that after he said this Jacobs struck the prosecutor a violent blow, which broke the nasal bone and caused the blood to flow. The three prisoners were convicted, Jacobs of inflicting grievous bodily harm, and the two others of occasioning actual bodily harm. Mr. Abinger says that the prosecutor was a trespasser. He certainly was not a trespasser on entering the room; whether he became one later it is unnecessary to discuss. If he was, it would not have justified the harm inflicted if it was occasioned by the appellant. It is said that the Deputy-Chairman did not put the case properly as regards the appellant, and that the appellant could not be convicted if he only said "Turn him out." The facts are that he said a good deal more, and, if so, he has no reason to complain of the summing up. There is no ground therefore for disturbing the verdict.

The main appeal in this case is against sentence. It is sufficient for this Court to say that the matter was dealt with by the Deputy-Chairman, and that he came to the conclusion that the appellant was the person chiefly responsible, or, as he said, the ringleader. It is plain that he was the manager of the business, and although as a rule the same sentence is not inflicted for grievous and for actual bodily harm, still the Deputy-Chairman was justified in inflicting the same sentence in this instance on

account of the difference in the position of the two men. Therefore, the Court is of opinion that there is no sufficient ground for giving leave to appeal against sentence.

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Application dismissed.

Solicitors for the Applicant—*Harnett & Co.*

A. L. B. T.

JAMES BENNETT OTHERWISE GEORGE BENNETT.

*There may be an appeal against conviction as a habitual criminal though preventive detention has not been inflicted.
Whether appellant has led an honest life during an interval of liberty is a question of fact.*

This was an appeal against conviction as a habitual criminal, by leave of Atkin J. There was also an application for leave to appeal against conviction and sentence for burglary. Appellant was convicted of burglary and of being a habitual criminal, at the Carmarthen Assizes, on the 27th October, 1913, before Banks J., and was sentenced to three years' penal servitude.

Howell Owen for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Although the appellant was convicted as a habitual criminal, no sentence of preventive detention was imposed, but he is anxious to have the conviction quashed. The evidence shewed that the appellant was convicted nine times between 1897 and 1909, and in the latter year was sentenced to five years' penal servitude for burglary. He was released from prison on the 16th January last, and did honest work continuously from then until July, when the burglary was committed. On the authority of *Mitchell*, 28 T. L. R. 484; 76 J. P. 423; 7 Cr. App. R. 284 (1912), there was no evidence on which he could be said to be at that time leading persistently a dishonest life. It is true that he was found to be in the possession of tools which were said to be burglars' implements, but they were glaziers' tools, and so not necessarily a proof that the burglary was pre-concerted; further, though the possession of these tools might be

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very good evidence to connect appellant with the burglary, it is no evidence that he was leading persistently a dishonest life during the six months before the burglary; in any case, this fact was not enough to outweigh the evidence of honest employment.

The judge misdirected the jury on the question of the possession of these tools. He said: "Does that entirely efface the fact that he has been working during these months honestly, and satisfy you that although he had been working honestly outwardly, he was inwardly leading persistently a dishonest and criminal life, in that he was only waiting his opportunity to break into the first house that he saw the opportunity of breaking into where he could possess himself of some valuable property?" That proposition would be equally true of a man who had led an honest life for fifteen years. He also said: "You must be satisfied that he had throughout been a criminal, and that he has only worked during these six months because he did not see the opportunity of committing crimes." If the word "throughout" refers to the appellant's previous life, the judge did what was held to be wrong in *Young* (above, p. 185).

R. Wynne Bankes, for the Crown, was not called upon.

THE LORD CHIEF JUSTICE: The appellant was convicted of burglary and larceny and as a habitual criminal; he was sentenced to three years' penal servitude, but no sentence of preventive detention was imposed. It is sufficient to say on the first conviction that there was abundant evidence on which the jury could come to the conclusion to which they did come, and there is no reason to think that the conviction for burglary and larceny was wrong.

There is more to be said on the conviction as a habitual criminal. During the period from the 17th January, when he left prison, until the 9th July he was at work in three different employments and conducted himself properly. On the 12th July he committed the burglary, and when arrested was found to be in possession of a set of implements which were undoubtedly of use for the purposes of burglary. He was called as a witness at the trial, but gave no satisfactory explanation of their possession. Can the Court say there was no evidence on which the jury could convict him of being a habitual criminal? We have all read the summing

up, and we cannot accept the suggestion that there was any misdirection; it was favourable to the appellant on this question which is summed up in the following words: "You must be satisfied that he has throughout been a criminal, and that he has only worked during those six months because he did not see the opportunity of committing crimes." It cannot be said that this was unfavourable, or that there was any misdirection on a point of law. If the jury heard the evidence and came to the conclusion that it was true that he was externally leading an honest life, but that in his own mind he was waiting the opportunity of committing a burglary, we cannot interfere. The question is not for us, but for the jury. We are unable to say that they could not come to this conclusion. We also desire to say that whether or not the fact that a prisoner is working honestly in the interval between his last release from prison and his arrest negatives the suggestion that he is a habitual criminal, is not a proposition of law. It is a question of fact in each case to be considered with the other evidence. If the only evidence here had been that the appellant had been leading an honest life during the interval in question, that would have afforded strong ground for urging this appeal. When the additional fact is proved the jury can say that it negatives that evidence. In our view, therefore, there is no ground for allowing this appeal.

Appeal dismissed.

A. L. B. T.

JOHN FREDERICK FELSTEAD.

Appeal pro forma in view of an application for leave to appeal to the House of Lords.

This was an appeal on a point of law. Appellant was indicted and tried on a charge of wounding with intent to do grievous bodily harm, at the Derby Assizes, on the 1st November, 1913, before Rowlatt J.; the jury returned "a special verdict" of insanity under the Trial of Lunatics Act, 1883, s. 2. He was ordered to be detained during His Majesty's pleasure.

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C. A. McCurdy for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. It is desired to appeal against the finding of insanity, but in view of the decision of the Court in *MacHardy*, [1911] 2 K. B. 1144; 80 L. J. K. B. 1215; 105 L. T. 556; 55 S. J. 754; 28 T. L. R. 2; 6 Crim. App. R. 272, it is doubtful whether the appeal can be successful here. It is, however, intended, if possible, to take the matter to the House of Lords.

Tinsley Lindley for the Crown.

The LORD CHIEF JUSTICE: We think that, having regard to the decision of the Court of five judges formed to consider this question, it would be impossible for us to come to a contrary decision, whatever our views might be. At the same time the Court thinks that the matter is of great public importance and interest, and the case has therefore been inserted in the list to give counsel the opportunity of applying to the Attorney-General for leave to take the matter to the House of Lords. It would be useless to argue the matter now, and, as a matter of form, we dismiss the appeal.

Appeal dismissed.

Solicitor for the Appellant—*H. Wellington Taylor* (under s. 10 of the Criminal Appeal Act).

A. L. B. T.

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MARY ANN GREEN.

Where a wife-defendant has been deprived, without any attempt to mislead the Court, of the defence of presumption of coercion by her husband, the Court may quash the conviction.

This was an appeal against conviction and sentence, by leave of A. T. Lawrence J. Appellant was convicted of larceny, at the Middlesex Sessions, on the 22nd November, 1913, and was sentenced by the learned Chairman to nine months' imprisonment with hard labour.

Roland Oliver for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with two men named Russell and Crawford; neither prisoner was defended by counsel. The evidence shewed that the appellant went into a shop and picked up a suit of clothes, Russell being in the shop all the time that she was there. After conviction Russell stated, and it is here admitted by the Crown, that he and the appellant were married; the presumption of coercion would therefore have afforded a defence to the appellant. Evidence of the relationship nearly came out when a police officer was in the box, but Russell protested, and the Chairman said to counsel for the Crown, "You had better not go any further." Russell's protest may have been because he feared that previous convictions would be brought out. Russell's cross-examination of witnesses was mainly directed to proving the innocence of the appellant, so it is probable that he did not know that the fact that they were married might be a good defence for her. In *Court*, 7 Cr. App. R. 127 (1912), Lord Alverstone C. J. said that the doctrine of coercion was a rule of law that ought not to be extended, but in *Caroubi*, 107 L. T. 415; 76 J. P. 262; 28 T. L. R. 248; 7 Cr. App. R. 149 (1912), the doctrine of presumption was affirmed, and it was held that the mere fact that a crime is committed by means of a preconcerted scheme between husband and wife does not rebut the presumption that she is acting under his coercion. The test is the presence of the husband when the crime is committed. (He was stopped by the Court.)

S. Moses for the Crown. Inquiries have been made and it is admitted by the Crown that the appellant is the wife of Russell, but the defence set up by both prisoners at the trial was that they were quite independent and unknown to each other; the conviction ought therefore to stand. I do not think that they knew that the marriage might be a ground of defence to the appellant, but I submit that the fact of the marriage was deliberately kept back, as it would have strengthened the case against appellant and Russell.

[The LORD CHIEF JUSTICE: We must remember that the prisoners were undefended.]

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No opportunity was given to the Court at the trial to see whether the presumption of coercion, which is rebuttable, applied. The appellant does not state in her notice of appeal that she is married to Russell, so the appeal is based on a fact which she does not allege and never has alleged. I rely upon *Baines and others*, 69 L. J. Q. B. 681; 82 L. T. 724; 64 J. P. 408; 19 Cox C. C. 524 (1900), though it must be admitted that Russell was in the shop with appellant all the time. It is putting a great responsibility on the judge at the trial to assume coercion after the jury have found a verdict.

The LORD CHIEF JUSTICE: The appellant, Russell, and another man named Crawford, were convicted on an indictment which charged them with stealing two suits of clothes. The case for the prosecution was that, while Russell and Crawford were in a pawnshop, ostensibly for the purpose of buying clothes, the appellant came in and took a suit, which she concealed beneath her clothes, and left the shop. In the confusion which arose from her pursuit Russell went out with another suit. The only point which troubles us is one not taken by the appellant in her notice of appeal or at her trial. The Chairman had not the facts before him that are before us. It is now undisputed, as it appeared after verdict given, that Russell and the appellant are husband and wife. No doubt at the trial the defence raised was that Russell and the appellant were in no way connected. Russell took the main part in the defence at the trial, at which neither prisoner was defended by counsel. At a certain stage a question was put to a police officer by Mr. Moses as to whether there was any connection between the prisoners. The officer answered "Yes," whereupon Russell protested that this was prejudicing his case. The Chairman thought counsel ought not to go any further, and Mr. Moses quite properly said he would not do so. The reason for Russell's protest was lest a previous conviction of the two might be elicited.

Now that the Court has the fact that the prisoners are married it has to consider, first, whether, bearing in mind that the point was not taken at the trial or in the notice of appeal, the Court ought to consider it; and secondly, whether, having regard to all the circumstances of the case, the Court ought to quash the conviction. As to the first point it is quite true that the appel-

lant takes only the ground in her notice of appeal that she did not do the acts with which she was charged, which it is clear she did do. But it is argued by Mr. Oliver that now that the Court knows that she is married to Russell, and he brings that fact to our notice, a *primâ facie* presumption of law arises in this class of case that she acted under the compulsion of her husband. It is only a *primâ facie* presumption, and we are of the opinion that it ought not to be extended; but it does apply to cases of this character, and we think that the point is open and ought to be considered by this Court. We sit here with powers conferred upon us by statute to consider convictions, and in this case, if once the Court is of opinion that the trial was not satisfactory in view of the circumstances now known to us, it is the duty of the Court to set aside the conviction. Bearing in mind the presumption of law, it is plain that this particular aspect of the law and facts was never presented to the jury. It could not have been, as the evidence on which it rested had not been elicited; the jury therefore were never directed on the point. The presumption is not one which rests on technical grounds, but is based on a knowledge and understanding of the relations that usually exist between husband and wife. If we came to the conclusion that the marriage had been deliberately concealed in order that the point could be raised on appeal, we should not intervene; but there is no evidence of that, and Mr. Moses does not suggest it. The only other contention is that as this defence was never raised before the jury, this Court should not act upon the *primâ facie* presumption. We have come to the conclusion that, upon the facts now disclosed, we ought to give full effect to the presumption of law, and we are therefore of opinion that in all the circumstances the conviction cannot stand.

Conviction quashed.

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CHARLES CRATCHLEY.

Isaac L.C.J. *If there is any evidence that a witness has guilty knowledge of a crime and so*
 Bray J. *may be an accomplice, the question is for the jury.*
 Lush J. *It is desirable that the jury should be directed to receive the evidence of witnesses*
of tender age with caution.

This was an appeal against conviction, by leave of Atkin J. Appellant was convicted of an assault with intent to commit sodomy, at the Hereford Assizes, on the 7th November, 1913, before Lord Coleridge J., and was sentenced to nine months' imprisonment with hard labour.

Bosanquet for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The only evidence against the appellant was that of Albert Smith, aged thirteen, the boy on whom the alleged assault was committed, and William Smith, aged ten; the latter said that the appellant told him to watch and warn him if anyone came near. My ground of appeal is that these boys were both accomplices, and that there was no corroboration of their evidence such as is required in law. In *Tate*, [1908] 2 K. B. 680; 77 L. J. K. B. 1043; 99 L. T. 620; 72 J. P. 391; 1 Cr. App. R. 39, it was held that the patient (who was over fourteen) in offences of this kind was an accomplice, and that where a prisoner is convicted upon the uncorroborated evidence of an accomplice the conviction will be quashed if the judge at the trial omitted to caution the jury against convicting upon such evidence.

[The LORD CHIEF JUSTICE: We want you to argue whether the younger boy was an accomplice.]

A boy who is under fourteen cannot be convicted of sodomy, but he can be indicted as an accessory: *Eldershaw*, 3 Car. & P. 396 (1828); and a woman can be indicted for rape as a principal in the second degree: *Ram*, 17 Cox C. C. 609 (1893). In *Jellyman*, 8 Car. & P. 604 (1838), it was held that a married woman who consented to her husband committing an unnatural offence with her was an accomplice, and that therefore her evidence required corroboration. The same considerations apply to a boy

who is between the ages of seven and fourteen. In *Eldershaw* the boy was under twelve. Corroboration of the evidence of one accomplice by that of another is regarded as insufficient if there is no corroboration by untainted witnesses. That a boy is under fourteen cannot affect the fact that his evidence is tainted. It is clear from the boy's evidence that he knew something wrong was going on; to constitute an accomplice there must be the intention of assisting in the commission of a crime, but he need not know exactly what crime is being committed: *Lord Baltimore*, 4 Burr. 2179 (1763). The presumption of law is against a boy of this age having a guilty mind, but evidence to the contrary emerges from his own evidence. In any case presumptions must be drawn in favour of a prisoner, so the matter must not be looked at in the same light as it would be if the boy were on his trial. The jury were not directed, as they should have been, to consider whether the boy was an accomplice or not.

Secondly, the evidence was so vague and contradictory that it was unsafe to convict. The date of the offence alleged in the indictment was the 20th May, but in their evidence the boys gave different dates, neither of which was the 20th May. This made it impossible for the appellant to call evidence as to what he was doing at the time. There were also discrepancies in the boys' evidence as to the facts.

H. G. Farrant for the Crown (who was called on as to the first point only). The younger boy was not an accomplice. In criminal proceedings against a person under fourteen, the evidence of a mischievous discretion to rebut the *primâ facie* presumption of law arising from nonage should be clear and strong beyond all doubt and contradiction; 4 Bl. Com. 23. It was for the defence in this case to shew that the boy knew that a crime was being committed, and that he actively assisted in the commission of it, but there was no such evidence. His evidence was that he was asked to keep a look-out, but that he ceased to do so, and watched the appellant; therefore, even if he was an aider and abettor at first, he ceased to be so. He may have known that an act of indecency was being committed without realising that it was a crime.

Further, the elder boy was not an accomplice in law, so his evidence did not require corroboration. If the patient is under

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fourteen he cannot be indicted for sodomy at all: 1 Hale P.C. 670. A boy cannot be indicted as a principal in the first degree for an assault with intent to commit a crime, if he cannot be indicted for committing the crime itself: *Eldershaw*. The judge warned the jury that their verdict must depend entirely whether they believed the two boys, and he expressed himself satisfied with the verdict.

Bosanquet. If the boys were over fourteen corroboration would be required; if they were under seven and unsworn, corroboration would be required. It would be an anomaly if it is not required when they are between seven and fourteen. The point is of great importance, as prisoners are frequently arraigned on the evidence of children. The question is not whether the witness could have been convicted, but whether his evidence was tainted. "When a child between the age of seven and fourteen is indicted for felony, two questions are to be left to the jury: first, whether he committed the offence; and, secondly, whether at the time he had a guilty knowledge that he was doing wrong"; Archbold's Criminal Pleading, 24th ed., p. 9, citing *Owen*, 4 Car. & P. 236 (1830). He need not know that it was a crime.

THE LORD CHIEF JUSTICE: In this case it is argued on behalf of the appellant that no warning was given to the jury by the judge that the only evidence against the appellant was that of accomplices, who were therefore tainted witnesses, and that the jury ought not to convict without other evidence. As Mr. Bosanquet quite rightly put it, he was not entitled as a matter of law to submit at the close of the case for the prosecution that there was no evidence to go to the jury, but it enabled him to argue that if the boys were accomplices, the judge did not give the caution which it has been held he should give, and that therefore the conviction should be quashed.

We must first consider whether the second boy, whose age was under ten, was an accomplice. The facts are that in May the appellant took the two boys to a narrow place between two sheds, and there committed the offence on the elder, after telling the younger boy to keep watch and give notice of the approach of any other person. There was only the evidence of the two boys. We have come to the conclusion that the second boy was not an

accomplice. There was in our view no evidence that he had a guilty knowledge fit to be left to the jury, though it is true that, if there was any evidence of it, it was for the jury to say whether he had a guilty knowledge or not; consequently he was not an accomplice. It is not disputed that to establish that he was an accomplice it must be proved that he had a guilty knowledge; therefore on the first proposition of law the appeal fails.

Nevertheless, in our view, there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not, that a warning should be given to the jury as to acting on the evidence of boys of this age—twelve and under ten—who are concerned in such an offence. It is not necessary that the judge should use the actual words “warn” or “caution”; if from his conduct of the case this Court is of opinion that the jury were in fact warned or cautioned, it would not interfere. It is plain that in this case the jury were told that they must be very careful in considering the evidence, and must not find the appellant guilty unless they were quite satisfied that they could accept the boys’ evidence. Counsel for the defence also put the point strongly, but notwithstanding all that the jury convicted the appellant, and the judge was of opinion that the conviction was right on the evidence given. That is an important factor, because, if the judge had had any doubt, there would have been weighty support for Mr. Bosanquet’s argument that the appellant ought not to have been convicted on this evidence. The judge said that the evidence left no doubt in his mind; he heard the boys’ evidence and also that of the appellant, and it is impossible in these circumstances for us to say that there has been any miscarriage of justice. The appeal therefore fails.

Appeal dismissed.

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CHARLES
CRATCHLEY.

ISAACS L.C.

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WILLIAM BARRON.

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The Court will quash a conviction when evidence of a previous accusation of an offence similar to that charged has been improperly given, although the judge warns the jury to disregard such evidence.

This was an appeal against conviction, by leave of ATKIN J. Appellant was convicted of sodomy, at the Winchester Assizes, on the 10th November, 1913, before Mr. Commissioner Low, and was sentenced to five years' penal servitude.

W. Blake Odgers, jun., for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The evidence at the trial was that the appellant spent the night in a hut with two boys; that he committed the offence with the elder, and immediately afterwards attempted to commit a similar offence with the younger, whose age was eleven. This boy clearly knew that what was happening was wrong, but yet he stayed in the hut, which had no door. He was therefore a tainted witness and his evidence required corroboration: *Noakes*, 5 Car. & P. 326 (1832); *Gay*, 2 Cr. App. R. 327 (1909). Nothing was said in the summing up as to the necessity for corroboration. It is true that the appellant admitted spending the night in the hut with the boys, which might be some corroboration.

Secondly, evidence which was inadmissible was given. The alleged offence was committed on the 18th July, and the boy was medically examined on the 21st July. He had also been examined by the same doctor on the 6th June in connection with another alleged offence by appellant, with which the latter was charged. but the charge was not proceeded with. The doctor stated in evidence that he had examined the boy before and found similar symptoms then. The appellant's name was not mentioned by the doctor, and it may have been in his favour, but it should have been left to me to elicit in cross-examination if I thought it desirable. Later, a detective mentioned the previous assault in such a way as to suggest that it was the defendant who had been guilty of it. The judge then thought that further details should be given in evidence. I objected, but he held that the evidence was admissible to rebut the defence of innocent association. This was a wrong decision: *Bond*, [1906] 2 K. B. 389; 75 L. J. K. B.

693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; C. C. R., is distinguishable, as there was no question of intention here. In his summing up the judge said: "As a general rule, when a person is charged with an offence, evidence as to any previous charge against him of a similar offence is generally ruled to be inadmissible. But during the examination of the doctor to-day he told us, as he thought he was bound to tell us, and as I think also, that, not only did he examine this boy on the 21st July, but also on the 6th June, and that on the 6th June he found the same conditions in this boy as he found on the 21st July. Then, of course, it became very material to inquire how it was that he came to make the previous examination, and then it came out that actually as far back as the 6th June a charge had been made against this very man of committing this very offence with this very boy, and the surgeon had been called in to make an examination in connection with that earlier charge. Now, that earlier charge was subsequently abandoned, no doubt for very good reasons, so you must consider that there was not sufficient evidence to support that charge, and we must treat it as if the man, the prisoner, were entirely innocent of that charge." If that is so, the charge could not be used to rebut the defence of innocent association, on which ground it was admitted in evidence. It has been held that an admission by the defendant that he had committed a crime of this nature at any other time with another person, and had a tendency to such practices, ought not to be received: *Cole*, 1 Phill. Ev., 7th ed., 181; 2 Russ. Cr., 7th ed., 2116 (1810); still more is evidence of a charge that has been abandoned inadmissible.

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Du Parcq for the Crown (who was called upon only as to the second point). Evidence which is otherwise admissible is none the less so because it suggests that the prisoner has committed another crime. The doctor said that what he found in the boy's condition was consistent with what was said to have happened in July; if the matter had been left there it would have been unfair to the appellant, and the judge thought that, reference having been made to the two examinations, everything ought to be cleared up in the interests of the prisoner. The evidence was admissible to rebut the defence of innocent association, for it was incredible that the appellant, with the earlier charge hanging over

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him, should have spent the night with the same boy unless it was for a guilty purpose. The detective on arresting the appellant said, "There is another charge against you"; that was admissible and let in evidence that the earlier charge had been dropped. I agree that the evidence was not admissible under *Bond*. No injustice to the appellant could have been done, for the judge told them several times that the appellant must be taken to be innocent of the first charge; that wiped out the effect of the evidence of the medical examination.

The LORD CHIEF JUSTICE: The appellant was convicted of sodomy, and the facts are that he slept in a hut on the night of the 18th July with two boys, one of whom, aged twelve, said that the offence was committed on him and that the appellant gave him twopence. Another boy, aged eleven, gave evidence in corroboration. A doctor was called and gave medical testimony that he found certain indications of penetration of the anus on the 18th July, and also that he had found the same indications more accentuated on the 6th June. The question put with reference to the 6th June did not indicate that the appellant was either suspected of, or charged with, that offence. So far we think no objection can be taken. It appears that further evidence was given subsequently with the object of meeting the defence of innocent association. It was stated at the trial, as appears quite clearly, that it must be assumed for all purposes that the appellant was innocent of the offence committed on the 6th June. Unfortunately there was a considerable discussion as to the charge for an alleged offence on that date, and evidence relating to it was admitted, on the ground that it was material to meet the defence set up. The criticism to be directed to that ruling is, that if the appellant must be taken to have been innocent of the offence in June, the evidence throws no light on the offence in July. If it is assumed that the appellant might have committed the offence in June, although it was not established and could not be established at the trial then proceeding for the offence in July, the evidence was very prejudicial to the accused, but the Court is clearly of opinion that the evidence was not admitted for that purpose. The allegation as to the offence in June did not help to ascertain what happened in July. It is said, and it is the best way in which it can be put, that the evidence was of assistance

to shew that the appellant's story that the sleeping with the boys in the hut was a mere innocent association could not be accepted, and that if once it was proved that the same prisoner was charged with committing the same offence with the same boy at an earlier date, that fact threw light on the event of July, and became material evidence. The answer is that if once it is assumed that no offence was committed in June, the utmost that can be said is that it was an imprudent act to sleep in the hut with the boy in July, but that is not sufficient. We are of opinion that the evidence of the charge relating to the earlier occurrence was not properly admitted at the trial for the offence in July. It is true that the judge took care to tell the jury that they must assume that the appellant was innocent of the offence in June, but the Court cannot think that, after what had taken place, that would enable the jury to clear their minds absolutely of the suspicion created by the evidence. It looks as if they thought there was the gravest suspicion, if not more, about that occurrence, especially when we find a series of questions directed to shew that the first charge was abandoned because the second was about to be heard. We are of opinion that there must have been at least a lingering doubt in the minds of the jury that the appellant was guilty of the offence in June. It is plain, therefore, that the evidence was prejudicial to him, and we cannot be certain that the jury would have found him guilty if it had not been admitted. The conviction must therefore be quashed, but we cannot order the discharge of the prisoner as there is another indictment on the file for which he has to be tried.

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Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL,
MR. JUSTICE BRAY, MR. JUSTICE AVORY AND MR.
JUSTICE LUSH.

JOHN SHELLAKER.

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Evidence which would support a prosecution barred by s. 5 of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885, as amended by s. 27 of 4 Edw. 7, c. 15, the Prevention of Cruelty to Children Act, 1904, is not excluded by that section if it is otherwise admissible.
Beighton, 18 Cox C. C. 535 (1897), *semble*, overruled.

This was an appeal against conviction on a point of law. Appellant was convicted of having had carnal knowledge of a girl under sixteen years of age, at the Leicester Assizes, on the 23rd October, 1913, before Rowlatt J., and was sentenced to twelve months' imprisonment in the second division. The appeal came before the Court, consisting of the Lord Chief Justice, Bray and Lush JJ., on the 8th December, when the question was considered to be of some difficulty, and was ordered to be re-argued before a fuller Court.

Sir W. Ryland Adkins for the appellant, who was not present. A man named Denton had originally been charged with a similar offence as that with which the appellant was charged, and with the same girl, but the prosecution offered no evidence against him. The proceedings against the appellant were commenced in May, and therefore, under s. 5 (1) of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), as amended by 4 Edw. 7, c. 15, s. 27, he could not be charged with any offence committed more than six months previously. Denton had been in the service of the appellant, but left it, and the neighbourhood, early in November. At the trial evidence was tendered to shew that the appellant had paid money to Denton with the object of getting

him to assume the guilt and leave the country. The girl gave birth to a child in June, so the intercourse which caused her pregnancy must have been more than six months before May. I objected to the evidence with regard to Denton because it could only refer to intercourse outside the six months' limitation, and was therefore inadmissible, but my objection was overruled. The judge said: "I am of opinion that this evidence is admissible; when I say this evidence I mean evidence of the nature indicated; and I shall admit it. The objection has been upon the ground that it is evidence as to former acts not charged in the indictment. If it is it is not admissible. But it is suggested that it is relevant, not as shewing former acts, but as tending to shew—how far it shews that will be for the jury to say—as tending to shew that this act in the first week in December was committed, because it is said, 'Here is a man with a child who is pregnant living in his house at the material time in December.' It is said by her that he then had connection with her, and it is sought to prove by evidence—it is sought to suggest by this evidence—that he took steps which shew that he was the person by whom she was pregnant; and if that is so, it is suggested that that indicates support of her story that he acted as her husband might possibly act, if she had been his wife, in the early part of December. I do not think it relates exclusively to the antecedent acts; I think it is also capable of bearing upon the acts charged. Therefore I shall admit the evidence." This evidence ought not to have been admitted, and the only other evidence against the appellant was that of the girl, who spoke to acts of connection in December, and possibly a statement made by the appellant on arrest, although that also had reference to Denton.

First, the evidence was inadmissible on general principles, namely, that it was not relevant to the issue, and only tended to shew that the appellant was guilty of other offences beyond those charged in the indictment. The principles on which such evidence is admissible were laid down in *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148, and it cannot be said in this case the evidence proved that the act charged was designed and not accidental, nor did it rebut any defence open to the appellant; nor was the evidence admissible as proving a system which would have brought it within the principle of *Bond*,

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Isaacs L.C.J. [CHANNELL J.: If the facts sought to be proved are relevant
 Channell J. to the charge they are admissible in evidence, notwithstanding
 Bray J. that they relate to other offences. See *Ollis*, [1900] 2 Q. B.
 AVORY J. 758.]
 Lush J.

The facts sought to be proved here were not relevant to the charge. I can find no case which lays it down that such evidence was admissible in cases of this character. *Ball*, [1911] A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. App. R. 31; *H. L.*, is distinguishable owing to the relationship of brother and sister which existed between the parties, and it was expressly said that the evidence was admissible because of the special circumstances of the case.

Secondly, even if the evidence was admissible as being within the general principle, it was inadmissible because it referred to acts of connection occurring before the six months' limitation. By statute the appellant could not have been prosecuted for such acts, and the reason for this is that the remoteness in point of time makes evidence of such acts less reliable. It follows, therefore, that evidence of such acts is not admissible when they are not the subject of the charge against him. The decision of Pollock B. in *Beighton*, 18 Cox C. C. 535 (1897), supports this view. The position of a man against whom such evidence is brought would be worse than that of a man who is prosecuted for such an offence; in the one case he is kept in the dark as to the charges, whereas in the other he knows from the indictment exactly what charge he has to meet. If the evidence referred *primâ facie* to the act with which the appellant was charged and only as an ancillary point to the earlier acts it might be admissible, but not when, as here, it refers primarily to the earlier acts.

[THE LORD CHIEF JUSTICE: If the evidence only shewed that the appellant was of evil disposition it would not be relevant. But if it shewed that there was a guilty passion, and that the act charged was the result of such passion, it would be relevant, even although it incidentally shewed that the appellant was a

man of bad character. In *Ball* Lord Loreburn L. C. said: "Their passion for each other was as much evidence as was their presence together in the bed, of the fact that when there they had guilty relations with each other."]

No other circumstances could shew it in that case because of the presumption of innocent relations between a brother and sister. The evidence must have had great weight with the jury, as leading them to believe him to be a man of bad character.

C. A. McCurdy for the Crown was not called upon.

The LORD CHIEF JUSTICE: In this case the appellant was convicted of having had unlawful carnal knowledge of a girl under the age of sixteen. The appeal is based mainly on the fact that evidence was admitted, to corroborate the girl's story, of what had taken place between the appellant and Denton, which it is said ought not to have been admitted, because it might disclose the fact that previous offences had taken place between the appellant and the girl before the six months limited by statute as the period within which a prosecution may be commenced. It is said therefore that the appellant was entitled to have that evidence excluded.

The argument is put on two grounds. First it is said that the evidence was inadmissible on the broad principle that to admit it would be to admit evidence that the appellant was a man of evil disposition, and that it could not be admitted as throwing any light on the offence with which he was charged. And it is said that if the evidence with regard to Denton is admitted the effect of its admission would be to shew that an offence had been committed before the period of six months' limitation, which would be an offence with which the appellant could not then have been charged; so that in effect it let in evidence of a particular offence contrary to the general principles of evidence.

With reference to that ground of appeal we are all of opinion that the evidence was admissible; that is to say, dealing with the general proposition apart from the specific provision in the statute as to limitation. The evidence is admissible on the well-known principle which was well stated in *Ball*, though it is right to say that the facts in that case were somewhat special. But

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the House of Lords did not in that case lay down any new principle of law; the question there was, which of two principles should be applied. That decision followed a line of authorities, of which *Ollis* was one, in which in the Court of Crown Cases Reserved a large majority of judges held that the evidence in question in that case was admissible. I will read the words of Channell J. where he speaks of the real principle on which this question rests, on p. 781 of the case in the Law Reports: "Such evidence is admitted, not because it tends to shew that other offences have been committed, but notwithstanding that in the particular case it may happen to do so." It is very easy no doubt to put cases where the application of the general principle might work hardships; the answer is that such cases may come within that class of case where, although the evidence is strictly admissible, it is of little value to the prosecution, but would indirectly so prejudice the fair and dispassionate trial of the prisoner that the judge would say that it ought not to be given. That does not conflict with the general principle, but in the ordinary course that is the direction that the judge would give. Equally there are cases where the evidence is so remote that the judge would say it was too remote and ought not to be admitted. One cannot further describe such cases unless all their facts are in evidence before us. It is sufficient to say in this case, with regard to the evidence that was admitted as to Denton, that it comes within the broad principle laid down in the two cases to which I have referred, and was therefore properly admitted.

Then it has been also argued that, assuming the evidence was admissible on the broad general principle, the evidence was wrongly admitted because of the provision in s. 5 (1) of the Criminal Law Amendment Act, 1885, as amended by s. 27 of 4 Edw. 7, c. 15, by which it is provided that "no prosecution shall be commenced under sub-sect. 1 of this section more than three" (now six) "months after the commission of the offence." Counsel for the appellant urges that that proviso makes the evidence inadmissible because it proves that an offence was committed before the commencement of the period of six months. Once the general principle is arrived at, it is evident that the statute does not affect it. The statute does not say that such evidence is not to be admitted; the law of evidence is not affected; it merely says that no prosecution is to be launched after the

specified period. Take the case put by Avory J. in the course of the argument. Suppose a letter had been written by the appellant nine months before the offence was committed which shewed that an amatory passion existed between these two persons, and evidence of it was tendered, it would clearly be admissible on the general principle we have laid down. If so, it would not cease to be admissible because it disclosed that an offence aimed at by the statute was taking place before the period of limitation. If Denton had given evidence that he saw or heard something which pointed to the existence of an amatory passion it would have been clearly admissible, and it would not have ceased to be so because it disclosed an offence before the commencement of the six months. When an analysis of the argument is made, it is clear that this evidence was equally admissible when given in respect of an offence in this action.

We ought to say with regard to the case of *Beighton*, which was a decision of Pollock B., that so far as that decision conflicts with the principles we have laid down, it must be taken as being overruled. The appeal therefore is dismissed.

Appeal dismissed.

Solicitors for Appellant—*Owston, Dickinson, Simpson and Bigg, Leicester.*

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BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND
MR. JUSTICE LUSH.

GEORGE FREDERICK LAW.

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15 December. *Murder.*

When the defence of insanity has been properly left to the jury, the Court will not as a rule reconsider the verdict.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, at the Leeds Assizes, on the 1st December, 1913, before Darling J., and was sentenced to death.

L. G. Hoare for the appellant (under s. 10 of the Criminal Appeal Act), who was present. It is desired to ask the Court to alter the verdict to a finding that, though guilty of the act charged, the appellant was insane at the time of its commission. The question of insanity was the only defence raised at the trial, and the ground of appeal is that the evidence of insanity was incorrectly and insufficiently left to the jury by the judge. There was evidence of insanity in the appellant's family, and of his having behaved strangely at times; the judge, however, disregarded all the evidence except that of a man named Stirling, whose evidence was open to certain comments. He also dismissed all consideration of the case for the defence with the remark, "You have heard the comments of counsel on both sides." All the witnesses for the defence were cross-examined by the judge as well as by counsel for the prosecution.

Coutts Trotter and *E. Marsden* for the Crown were not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of the murder of Annie Cottrell. It is quite clear from the defence

put forward at the trial, and it is admitted by Mr. Hoare, that the only argument at the trial was that the appellant was insane when he killed the woman, and that a special verdict ought to be recorded. It is now urged before us that there was some misdirection of the jury by the judge, and in order to establish that Mr. Hoare calls our attention to certain passages at the end of the summing up dealing with the defence. We are asked to say that the summing up was unsatisfactory because the judge did not call the attention of the jury to the rest of the evidence for the defence, but limited his comments to the criticism of one witness, whose evidence he said was too wide. It must be remembered that the case was tried in one day, and the jury therefore had all the evidence before them and clearly in their minds, and we cannot say, taking the summing up as a whole, that the direction is unfavourable to the appellant. Passages to be found earlier in the summing up are in favour of the defence. Our attention has been directed, quite properly, by Mr. Hoare, to the evidence called to establish the insanity of the appellant at the time the act was committed. There was a considerable amount of evidence of what may be called a bad family history; and beyond that there was also evidence to shew that the appellant was at times moody and depressed, and had been, as the witness expressed it, "dotty" at the time of his mother's death. Other expressions were used by other witnesses conveying the same view. There was also evidence to shew that within the last twelve months he had been injured in the head by the fall of a door. There was a considerable body of evidence on which the jury, if they accepted it in its entirety, and if they rejected the evidence to the contrary brought forward by the Crown, could have found the appellant insane. It is impossible for us, not having heard the witnesses, to interfere with a verdict given on ample evidence and after a proper direction. The Secretary of State has a better opportunity of making inquiries and of getting good advice than we have; we must therefore leave it to him to deal with the matter if he thinks fit.

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Appeal dismissed.

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EDWARD MURRAY.

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Lush J.

The jury ought to be directed that a child of tender years who gives unsworn evidence under s. 30 of 8 Edw. 7, c. 67, the Children Act, 1908, ought to be corroborated, but if there is in fact good corroboration of such evidence the Court, in view of the proviso to s. 4 of the Criminal Appeal Act, will not quash a conviction.

This was an appeal against conviction, by leave of A. T. Lawrence J. Appellant was convicted of an indecent assault, at the Derby Assizes, on the 6th November, 1913, before Rowlatt J., and was sentenced to twelve months' imprisonment with hard labour.

E. P. S. Counsel for the appellant, who was not present. The appellant was indicted on a charge of attempted rape on a girl of five and a half years of age, and was convicted of an indecent assault. The first ground of appeal is that there was no evidence to go to the jury identifying the appellant as the person who was seen with the girl, and who was alleged to have assaulted her. The man and the girl were seen together by a witness, Ethel Brown, who failed to identify the appellant at the police-station when he was put up with other men in the usual way for identification, although she did identify him at the trial. A witness, Clarke, who saw them, did not recognise the man as the appellant, although he knew him well. This is practically conclusive in the appellant's favour. Further, there were striking discrepancies in the descriptions given by the various witnesses for the prosecution as to the clothes the man was wearing.

Secondly, the judge misdirected the jury by failing to tell them that the little girl, who was not sworn, required corroboration. All he said on the subject was: "The evidence is all what we call circumstantial evidence in law except the evidence of the little girl, which is quite specific. It must be accepted with very great caution, but it is evidence which has circumstantial evidence to corroborate it in the circumstances to which I have drawn your attention." (Counsel proceeded to refer to several other passages in the summing up in which he suggested that the judge misdirected the jury, but which are not material for the purposes of this report.)

Marshall Freeman for the Crown (who was called on only as to the two points reported above). Even assuming that the judge gave no specific direction as to the necessity for corroboration, if there was corroboration in fact this would cure the defect. There was no necessity to warn the jury, by quoting the actual wording of the statute, if there was substantial evidence in addition to the girl's story, especially where a caution was given as to accepting the girl's evidence. The words of the caution were sufficiently wide to suggest that the judge had the statute in mind, and as this is directory to the judge, nothing more was necessary.

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As to identification, the girl herself was of exceptional intelligence for her age, and she was corroborated by Ethel Brown both before the magistrates and at the trial, although it is true that she failed to pick out the appellant at the police station. In spite of this it was open to the jury to accept her identification. Clarke, who saw the man with the girl, said he did not see the man's face, but he described the man, and his evidence was a partial description of the appellant. (He was stopped by the Court.)

THE LORD CHIEF JUSTICE: The appellant was convicted of an indecent assault on a child of about six years of age, and this appeal is based in the main on two grounds; firstly, that there was no evidence of identification beyond that of this child, and, secondly, that the judge misdirected the jury as to the child's evidence. Other points have been taken, but it is sufficient to say that they are all somewhat minute criticisms on points which it would be proper to argue before a jury, but which are of no assistance to this Court. They are not of sufficient importance to induce us to say that there has been a miscarriage of justice, and even if there were further similar points the cumulative effect would not be sufficient to lead to such a conclusion.

As to the first point raised, it is plain, on consideration of the evidence, that there was other evidence identifying the appellant beyond that of the child, namely, that of Ethel Brown. It is true that she failed to identify him at the police station, but she did so in Court; the jury heard her examined and cross-examined, and also heard all that could be said by counsel for the defence as to her failure to pick out the appellant at the police station. It was a proper matter for the consideration of the jury, but she

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swore to the identification at the trial, and that alone would be enough. But there was further evidence on the point, namely, the evidence of Clarke. It is impossible for us to say, in view of this evidence and other details, such as the finding of a handkerchief alleged to be the appellant's, and the finding of cowdung on his clothes, that there was not sufficient evidence of identification.

Then we come to the question raised on the summing up of the judge. It is urged that the judge ought to have called the attention of the jury to the fact that in law they could not act on the child's evidence unless she was corroborated, since her evidence was not given on oath. We think that that is the direction which ought to be given to the jury in such cases, and that it ought to be pointed out to the jury that they must not act on the evidence of the child alone, but that there must be corroboration of it before they are entitled to regard the child's evidence at all. If we came to the conclusion that the jury convicted the appellant on the child's evidence alone we should have no alternative but to quash the conviction. But in our view it is not a practical proposition to say that if the jury refused to believe all the other evidence they would yet have acted on the girl's evidence, when it was unsworn and uncorroborated. We must take into account what was said by the judge, namely, that there was circumstantial evidence to corroborate the girl's story. We have come to the conclusion that there was corroborative evidence, and if the jury accepted it they could accept, and act on, the evidence of the child. We are satisfied that it was not a right direction in the circumstances, but we are also satisfied that no injustice has been done. For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Pattinson and Brewer*, agents for *Flint and Son*, Derby.

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MARIA JONES.

*Severity of sentence.*1913
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Bray J.
Lush J.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of larceny, on the 6th November, 1913, at the County of London Sessions, and was sentenced by the Deputy-Chairman to three years' penal servitude.

*Appellant in person.**N. L. Goddard* for the Crown.

The LORD CHIEF JUSTICE : The appellant was convicted of stealing a pair of boots which were hanging on a string outside a shop. It is true that there are a number of convictions against her, and that she has passed some thirty-two years of her life in prison. Her age is now seventy-two. But we think the sentence far too severe, and in all the circumstances we think that a sentence of six months' imprisonment in the second division is sufficient to meet the case.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING,
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MR. JUSTICE ATKIN.

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An objection to a count as bad for duplicity, or to the number of counts as embarrassing, must be based on the ground that the defence is likely in fact to be prejudiced by such counts, and this is a matter for the discretion of the judge, subject to the revision of this Court, which, if that discretion is improperly exercised, will quash a conviction, whatever view it takes of the merits of the case.

Objection to a defect on the face of an indictment should be taken before plea pleaded.

Proviso to s. 4 (1) of the Criminal Appeal Act applied.

This was an appeal against conviction on a point of law. Appellant was convicted of incest, at the Durham Assizes, on the 27th June, 1913, before Rowlatt J., and was sentenced to four years' penal servitude. The case for the appellant was partly argued on the 30th July, 1913, before Bray, Avory and Lush JJ., who ordered the case to be re-argued before a fuller Court, on the ground that it raised a difficult question of law.

L. G. Hoare, for the appellant (under s. 10 of the Criminal Appeal Act), who had been granted bail. The ground of appeal is that the indictment was bad. It alleged in the first count that the appellant "on divers dates between the month of January, 1909, and the 4th October, 1910, did have carnal knowledge" of his daughter, May Eleanor Thompson; this count further stated that at the time of the alleged offences the girl was under thirteen years of age; and a second count charged him with like offences "on divers days between the 4th October, 1910, and the end of

February, 1913." These counts are, in the first place, all bad for uncertainty; a prisoner is entitled to be given notice by an indictment with certainty of the time, place, nature, and number of offences which he has to meet; this indictment is wholly uncertain on all these points. Secondly, these counts were bad for duplicity; all the text-books lay down the rule that one count must charge one offence only.

There was, in my submission, no power to amend the indictment, and there is no difference in the principles applicable to uncertainty and duplicity; duplicity is merely one instance of uncertainty.

[DARLING J.: Evidence of offences on other days would in any case have been admissible on the authority of *Ball*, [1911] A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. App. R. 31—H. L.]

A general verdict was returned, so it does not appear whether the appellant was convicted of one offence or more; such a verdict is of no assistance to the judge who has to pass sentence.

[The LORD CHIEF JUSTICE: The Court undoubtedly has a discretion as to uncertainty of time or place; has it an equal discretion as to duplicity? If it has, we should hold that there was no substantial miscarriage of justice. Then, assuming we have no discretion, was the objection taken at the right time?]

In Hawkins's Pleas of the Crown, Book II., s. 82, it is stated that if an indictment charge a man generally with several offences at several times, without laying any of them on a certain day, it is wholly void; the reason is given in a note that each offence requires a separate and distinct punishment in proportion to the enormity of it.

[BRAY J.: *Nash*, 33 L. J. M. C. 94; 4 B. & S. 935; 10 Jur. (N. S.) 819; 9 L. T. 716; 12 W. R. 421; 9 Cox C. C. 424; (1864) seems to shew that duplicity is not a fatal objection on a writ of error.]

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[The LORD CHIEF JUSTICE: At the moment we do not wish to hear you further on the ground of duplicity. But we wish to hear you as to whether the objection was taken in time.]

Objection was not taken before plea, but that does not matter here. The powers of the Court are wide enough to enable it in any case to quash the conviction, if it is thought that the point of law taken is a substantial one.

[The LORD CHIEF JUSTICE: The Court does not doubt that it has power to deal with the question, but you are asking us to act on a technical objection. Is there not another technical rule which applies against you?]

As a matter of law the objection may be taken at any time, and it is only a matter of convenience that it is taken before plea. See Blackstone's Commentaries, 21st ed., Vol. IV., 333.

[LUSH J.: *Heane*, 4 B. & S. 947; 33 L. J. M. C. 115; 10 Jur. (N. S.) 724; 9 L. T. 719; 9 Cox C. C. 433; (1864) shows that an indictment can be quashed after plea pleaded.]

In *Goldsmith*, L. R. 2 C. C. R. 74; 42 L. J. M. C. 94; 28 L. T. 881; 21 W. R. 791; 12 Cox C. C. 479; (1873) Bovill C. J., said: "It must be observed that no objection was taken before plea, but issue was joined and the jury charged. But at the close of the case for the prosecution, and before verdict, the present objection was taken. The learned judge who tried the case was not bound to give any effect to such an objection taken at that stage. If he thought the objection clearly a good one, he might have quashed the indictment," and Bramwell B., said: "I think for the future it would be better that such objections should be formally taken by motion to arrest judgment." This indictment cannot be cured by verdict. An indictment framed on a statute, even if it contains defects, may be cured by verdict if it follow the statute. The broad principle is that a formal objection must be taken before plea in accordance with 14 & 15 Vict. c. 100, s. 25, but it is open to a prisoner to take a substantial objection at any time. (He was stopped by the Court.)

Bruce Williamson for the Crown. I submit that the indictment was good. I ought to state that before the trial counsel did inform me that he intended to take this point. Two objections have been taken to the indictment.

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[The LORD CHIEF JUSTICE: You need only deal with the question of duplicity.]

I admit the text-books allege duplicity to be fatal to an indictment, but the cases cited by them do not bear out that proposition.

In *Devett and Fox*, 8 Car. & P. 639 (1838), where two different offences were alleged in one count the indictment was quashed, but that is no authority for the proposition that a count which alleges more than one commission of the same offence is bad. There is no doubt on the evidence in the present case that the offence was committed over and over again. Under the old practice the appellant would have been charged with offences on, say, ten different dates, all fictitious; after conviction he could not plead *autrefois convict* or *autrefois acquit* to charges with regard to any other dates in the period, as he can now after conviction on this indictment; this form of indictment is therefore more favourable to him. According to Hale's Pleas of the Crown, Vol. II., Chap. 24, p. 173: "If there be one offender and several capital offences committed by him, they may be all contained in one indictment, as burglary and larceny. Larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment." There is no common law rule that several offences on several days must not be charged in one indictment, but a prisoner may ask that the Crown be made to elect. The judges introduced a rule that it was unfair to try a man for more than one felony at a time. This rule was later recognised by the Legislature through statutory exceptions to it being enacted; see the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100, and the Larceny Act, 1861, 24 & 25 Vict. c. 96. In *Castro*, 6 A. C. 229; 50 L. J. Q. B. 497; 44 L. T. 350; 29 W. R. 669; 14 Cox C. C. 546; 45 J. P. 452 (1881), H. L., Lord Blackburn explains the origin and development of this judge-made rule, and alludes even to two felonies being chargeable in one count, but for this rule.

In *Jones*, 2 Camp. 131; 11 R. R. 680 (1809), Lord Ellen-

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borough said that while in felonies it was usual to call upon counsel for the prosecution to elect, the practice had never been extended to misdemeanours. This is a case of misdemeanour, and if the same act is repeated many times, the judge ought to refuse to put the Crown to election, as it is impossible for the jury to try the case unless they know all the facts. In fact, as in theory, every count is an indictment. In *Edmondson*, 59 J. P. 776 (1895), objection was taken before plea that two offences were disclosed in three counts of the indictment, and Lawrence J., quashed those counts, and tried the prisoner on a fourth count, but here the counts are also objectionable because the offences were charged in the alternative. I have not been able to find any other case where this was done. It is no hardship to the appellant to frame the indictment in this way; see the judgment of Blackburn J., in *Nash*. In *Curtis*, 29 T. L. R. 102; 9 Cr. App. R. 9 (1913), this Court held that it could not interfere if a judge refused to put the prosecution to election; in that case the prisoner was charged in different counts with offences against three different girls, so it was a stronger case than this one. I admit that in civil law a count in a declaration was necessarily bad if it was double, but I cannot find any case to support the same proposition in criminal law. It is said, in Archbold's Criminal Pleading, 24th ed., p. 82, that where several felonies are joined in the same count, and objection is taken before plea, the Court may quash the indictment, but no authority is quoted for that statement. Before the Criminal Procedure Act, an indictment which did not allege any date would undoubtedly have been bad, but now time is made unimportant.

In *Chandler*, 1 Salk. 378; 1 Ld. Raym. 581 (1702), an indictment alleging deer stealing between certain dates was held to be good, "for if a day certain was alleged, the informer is not tied up to that; now in these cases he is confined to give evidence of a killing within three days, so it is more certain and better for the defendant." The rules then were more strict than they are now. In *Cohen*, 3 Cr. App. R. 180 (1909), where an indictment had been amended, it was held that it ought not to have been amended, but that there had been no miscarriage of justice. I submit that the judge was right in refusing to quash the indictment, which was the only motion made at the trial; election was not asked for, but if it had it ought not to have been granted.

In any case there was no miscarriage of justice. The prisoner had ample notice in the proceedings on committal of the case alleged against him. There was strong evidence that the offence had been committed on many occasions; in these circumstances the girl was unable to speak as to particular dates. The indictment here may be irregular, but it truly stated the effect of the evidence. In *Harris*, 5 Cr. App. R. 285 (1910), the proviso to s. 4 (1) of the Criminal Appeal Act was applied, although it seemed that the indictment was bad. In *Edwards and Gilbert*, 8 Cr. App. R. 128 (1912), the proviso was not applied, but the Court had received a report from the Chairman who tried the case which influenced their decision. The test is whether the appellant was prejudiced in his trial. The Criminal Appeal Act has abolished some of the old forms of procedure, and the intention of Parliament was that no purely technical point should succeed. It may be the case that in this respect a prisoner's position is worse since the Act came into force.

In *Philpot*, 1 Car. & K. 112 (1843), objection was successfully taken to the indictment after plea, but in that case, which was a charge of obtaining money by false pretences, the indictment did not allege that the prisoner knew the statements made to be false; the indictment therefore disclosed no offence. Here, even if the indictment disclosed too many offences, the fault is cured by verdict, for the jury found the appellant guilty of them all.

Hoare: I submit that it is not open to the Court to inquire into the merits of the case. There is no need for an indictment at all if a conviction on a bad indictment can be allowed to stand. I rely on *Edwards and Gilbert*; in *Harris* the appellant was not represented by counsel. The evidence in this case was directed principally to one day, but a general verdict was returned, which means that the appellant has been convicted of other offences as to which there was little or no evidence. The passage I have quoted from Hawkins's Pleas of the Crown is supported by the judgment of Holt C. J., in *Roberts*, Carthew, 226 (1693), which is a direct authority for saying that an indictment is bad for duplicity, and that objection can be taken by moving in arrest of judgment.

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The LORD CHIEF JUSTICE: In the opinion of the Court this appeal fails. We will give our reasons at a later date. The time while the appellant has been in prison may count towards his sentence, but not the time during which he has been on bail.

C. a. v.

The following written judgment was delivered on the 19th December, 1913, by

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The LORD CHIEF JUSTICE: The appellant was convicted under the Punishment of Incest Act, 1908 (8 Edw. VII. c. 45), of misdemeanours committed with his daughter, who had not, at the date of trial, attained the age of sixteen years.

The first count in the indictment charged him with having committed the offences "on divers days between the month of January, 1909, and the 4th day of October, 1910," the girl then being under the age of thirteen years.

The second count charged him with having committed offences "on divers days between the 4th day of October, 1910, and the end of February, 1913."

He appeals upon the ground that the indictment is bad for duplicity, or, in other words, that more than one offence is charged in each of the aforesaid two counts of the indictment.

This objection was taken at the trial, and the judge was asked, on this ground, to quash the indictment, but not until the jury had been sworn and the prisoner had pleaded. It was contended for the Crown that an objection to an indictment for any formal defect apparent on the face thereof should be taken by demurrer or motion to quash before the jury were sworn and before the accused had pleaded.

The judge held that there was no substance in the objection, and allowed the case to proceed upon the indictment as presented.

At the hearing before this Court, it was not, and, indeed, it could not be disputed that the appellant had not thereby suffered any embarrassment or prejudice at the trial, inasmuch as in the depositions and during the trial offences were proved on specific dates, of which the appellant had had ample notice, and for which the defence was fully prepared.

Upon a perusal of the evidence, the offences had undoubtedly

been committed, and there was no substantial defence apart from the defect above mentioned in the proceedings. The appeal was based solely on the irregularity of pleading in the indictment, which, according to the appellant's contention, entitled him to have the conviction quashed.

It was urged before us that a prisoner was entitled to have sufficient notice of each offence charged against him, and that the effect of grouping a number of different offences in one count and charging the accused with having committed them "on divers days" between certain periods was an objection not merely of form, but one of substance, because it might prejudice the fair trial of the prisoner, but that even if it was only an objection of form it must prevail. In this case, as we have already stated, the prisoner was not in any way embarrassed or prejudiced, and we are of opinion that, although very high authorities have in the past expressed the opinion that, as a matter of law, even two offences of felony could be charged in the same count (see *Castro v. The Queen*, L. R. 6 App. Cas. (1881), *per* Lord Blackburn at pp. 244 and 245), the practice is uniform and well established, that several offences should not be charged in the same count, and the indictment in this case was irregular for that reason.

We are of opinion that there being a defect on the face of the indictment, the objection should in strictness be taken before plea, and therefore the technicality raised by the defence could be met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent the defence raising any objection based on an irregularity or defect in the proceedings at any time. We do not, therefore, decide that the objection may not be taken at a later period and even after verdict.

The appellant contended that he could take the objection at any time, and could on such an indictment move in arrest of judgment after verdict. No case was cited as an authority for this proposition, and there are observations to the contrary in *Nash v. The Queen*, 33 L. J. M. C. 94, at p. 97; and 4 B. & S. 935, at p. 945. It is, however, unnecessary for us definitely to determine this point in view of the conclusion announced by us at the hearing of the appeal.

We dismissed this appeal on the ground that, even assuming that the objection raised after plea to the defect in the form of

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indictment was not taken too late, and that the appellant could have moved in arrest of judgment, no substantial miscarriage of justice had occurred, and that we were therefore bound to give effect to the proviso in sect. 4, sub-sect. 1 of the Criminal Appeal Act, 1907, which is as follows: " Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case. It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this Court. An indictment so framed might undoubtedly hamper the defence, and if it did we should give effect to the objection. There are also other objections to an indictment which must be held good at any time, as, for example, an objection on the ground of want of jurisdiction.

One of the objects of s. 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the Legislature was that justice should be done in spite of a wrong decision, and that the Court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice.

The Court must always proceed with caution when it is of opinion that a wrong view of the law has been taken by the judge presiding at the trial, but when it is apparent, and, indeed, undisputed, as it is and must be in this case, that no embarrassment or prejudice had in fact been suffered in consequence of the pleader having made the manifest error above mentioned, the Court must act upon the proviso in this section of the Act.

A reference to the decisions of this Court will shew that this is the principle upon which appeals should be decided. In the case of *Maurice Cohen*, 3 Cr. App. R. 180, the Court came to the conclusion that an amendment to an indictment ought not to have been made, but there being no miscarriage of justice, the proviso of s. 4 of the Criminal Appeal Act, 1907, came into operation, and they therefore dismissed the appeal.

In the case of *John Harris*, 5 Cr. App. R. 285, the decision was based upon the view that the indictment was bad, and the Court held, assuming that the indictment was bad, they were of opinion that the case came within the proviso of s. 4, sub-s. 1 of the Criminal Appeal Act, 1907, inasmuch as the jury had convicted on the clearest evidence and there was no appeal on the merits, and they found it impossible to say that any actual miscarriage of justice was occasioned.

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In the case of *Arthur Edwards and Alfred Gilbert*, reported in 8 Cr. App. R. 128, the Court came to the conclusion that the indictment was bad, but were asked to affirm the conviction on the ground that there had been no substantial miscarriage of justice in pursuance of the proviso to s. 4, sub-s. 1 of the Criminal Appeal Act, 1907. Mr. Justice Ridley, in delivering the judgment of the Court, referred to the decision in *John Harris*, but pointed out that the objection in that case was not taken at the trial, whereas in the case then before the Court it was taken in the Court below. There were, however, other reasons why the Court could not come to the conclusion that there had not been a substantial miscarriage of justice. There was an appeal also against the conviction on fact which the Court had not heard, and a communication had been received by the Court from the judge who presided at the trial, which prevented the Court from coming to the conclusion that it would be right to affirm the conviction notwithstanding that they had decided the point on the indictment in the appellant's favour, and for these reasons they quashed the conviction. It is obvious, on examination of that case, that there were cogent reasons why the Court could not affirm the conviction.

Applying the principle to be deduced from these cases, we are of opinion that the present case comes within the proviso to s. 4 of the Criminal Appeal Act, 1907, and we therefore dismiss the appeal.

Appeal dismissed.

A. L. B. T.

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DAVID JOHNSTON.

When the same act is differently charged in various counts the Court may construe a verdict of guilty upon all as if it was limited to the least offence alleged.

This was an appeal against conviction on a point of law. Appellant was convicted of obtaining goods by false pretences, and of obtaining credit by fraud, at the Winchester Assizes, on the 12th November, 1913, before Mr. Commissioner Low, and was sentenced on the 13th November to three years' penal servitude and twelve months' imprisonment with hard labour, the sentences to run concurrently.

H. Atkins for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The indictment in this case contained three counts; in the first the appellant was charged with obtaining three horses by false pretences, the false pretences being that a cheque for £60 was a good and valid order for the payment of that sum, and that he had authority to draw for that amount on the London City and Midland Bank, Aldershot; in the second he was charged with obtaining credit by false pretences, and in the third with obtaining credit by fraud other than false pretences. The cheque was given on the 11th October, but dated the 13th October. The amount to his credit in the bank was £6 12s. 5d. At the end of the case for the prosecution it was submitted on behalf of the appellant that there was no case to go to the jury. The judge ruled that there was, and recalled the prosecutor, who said that the reason given by the appellant for postdating the cheque was that, it being drawn on a Saturday

afternoon, there was no advantage in dating it earlier than Monday.

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I submit that this was not a cash transaction, and that therefore there was no evidence of any false pretence of an existing fact. In *Walne*, 23 L. T. 748; 11 Cox C. C. 647 (1870), where the prosecutor was asked not to cash the cheque until a later date, the conviction was quashed, although the prisoner had no account in the bank at all. In *Parker*, 7 Car. & P. 825; 2 Moody C. C. 1 (1837), where the conviction was upheld, there was a special bargain for a ready money sale.

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Secondly, the judge did not direct the jury as to the specific false pretences charged in the indictment.

[BRAY J.: Was not that cured by the discussion that took place just before whether there was any evidence of those false pretences to go to the jury?]

St. Gerrans for the Crown (who was not called upon as to the points raised above, but whether the conviction on all the counts, followed by sentences both for obtaining goods by false pretences and credit by fraud, could be upheld.) There is no authority that a man cannot be guilty of both offences. This was a gross fraud. If there was evidence to support the conviction for obtaining goods by false pretences the sentence was not too severe.

The LORD CHIEF JUSTICE: It is unnecessary to travel into the circumstances of this case. A statement was made by the prosecutor on which, no doubt, the jury could come to conclusion that the false pretences charged had been made. In substance it was a cash transaction; although dated on the Monday the cheque was handed over on the Saturday as if it was current coin. The difficulty in the case is that the appellant was charged with both false pretences and fraud other than false pretences. The jury might have found that he did not make the false pretences, but that he did obtain credit by fraud. It was only one act and only one conviction is possible. The judge, when the jury found the appellant guilty on all three counts, sentenced him for both offences, three years' penal servitude for the false pretences, and twelve months' imprisonment with

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hard labour for obtaining credit by fraud. In our view the offence was either the one or the other. The proper course when we are in doubt is to take the view that the jury meant to find the appellant guilty of the lesser offence. The conviction for obtaining goods by false pretences, and the sentence of three years' penal servitude must be quashed, and the sentence of twelve months' imprisonment with hard labour must remain.

Conviction on two counts quashed.

Sentence reduced.

A. L. B. T.

RICHARD MYERS.

Where, owing to the want of a note of the evidence, an important point has been wrongly put to the jury, the Court may quash a conviction.

This was an appeal against conviction by leave of A. T. Lawrence J. Appellant was convicted of feloniously receiving stolen goods, at the Central Criminal Court, on the 19th November, 1913, before the Recorder, and was sentenced to nine months' imprisonment in the second division.

Marshall Hall, K. C. (with him *W. Frampton*) for the appellant, who had been granted bail and was present. The appellant was charged with two other men, Kirk and Sullivan; Kirk pleaded guilty to larceny, and was called as a witness against the appellant; the jury stopped the case against Sullivan at the end of the evidence for the prosecution. The goods in question were stolen from Messrs. Whiteley, Ltd., and the appellant is a man who carries on a large business close to Whiteley's, and deals in the same class of goods as those which were stolen. The goods were displayed in his window after he bought them from Kirk still bearing Whiteley's label. Kirk was caught red-handed selling stolen overcoats to the appellant's assistant; the police made enquiries, and the appellant volunteered the statement that he had been buying goods from Kirk for months, and he produced receipts for payments. Then Kirk, thinking that the appellant had behaved badly to him in producing these receipts, made a statement in-

criminating the appellant. On the first occasion when Kirk visited the appellant he told him that his (Kirk's) head man, Durrant, had over-stocked and wished him to dispose of the surplus goods. There was a discussion as to price, and Kirk rang up Whiteley's on the telephone, purported to speak to Durrant, and then reported that he was authorised to accept the price offered. At the end of the first day, when I was calling evidence to character, the jury said they thought they could come to a decision, but after discussion the foreman said they were not quite agreed.

On the next day the jury asked whether Durrant had spoken to the appellant on the telephone, and he said he never had; it had never been alleged that he spoke to the appellant, and no doubt there was an accomplice at Whiteley's who answered the telephone. I said that Kirk, who was not then in Court, had admitted telephoning; the Recorder said his note was to the contrary effect. The shorthand writer of the first day was not in Court, so his note could not be referred to, and ultimately Kirk was recalled and the Recorder asked him if his note was correct; Kirk said that it was. This fact was pointed out to the jury as being the one piece of corroboration of Kirk's evidence. The shorthand note now shews that in answer to me in cross-examination Kirk said that he only rang up Whiteley's on the first occasion; it is evident therefore that the Recorder's view was wrong. (He was stopped by the Court.)

Huntly Jenkins for the Crown. Although this incident was unfortunate there was ample evidence, apart from that of Kirk, on which the jury could convict. The appellant bought practically everything that Kirk brought him, although none of the goods were ordered, and he never made any enquiries of anyone in authority at Whiteley's. I have not been instructed to press the case against the appellant.

THE LORD CHIEF JUSTICE: In this case the appellant was convicted on an indictment which charged him, together with Kirk and Sullivan, with receiving, as far as the appellant was concerned, goods, the property of Messrs. Whiteley, Limited, knowing them to have been stolen. Mr. Marshall Hall, who appeared for the appellant in the court below, has taken one point which he says is sufficient ground for setting aside the conviction without it

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being necessary for him to go into further points which would also justify us in taking that course. The point is this: At the trial the jury nearly stopped the case at the end of the first day. Mr. Marshall Hall was calling witnesses to character, and a statement was made by the jury that it was unnecessary to call further evidence of that kind; there was then some discussion among the jury, and it was said that they could not quite agree. The next morning it appears that considerable importance was attached to the question whether or not Kirk, who was a witness for the Crown, and gave the strongest evidence against the appellant, had or had not telephoned to Whiteley's from the appellant's office. Kirk stated in cross-examination that at the first transaction he had done so when negotiating as to the price. It is not disputed that in the first instance Kirk came with authority from Durrant, representing Whiteley's, and sold certain goods to the appellant in a normal way, the only difference being that the receipts given in the first two cases were green, and afterwards white. It was said by Kirk that the first two transactions were regular and proper, and that the subsequent transactions arose from the temptation held out to him by the appellant, white receipts being given in order that the appellant might deceive his own employees. The appellant's case was that all these transactions were carried out in much the same way, and that Kirk had a conversation on the telephone with someone at Whiteley's whenever there was a dispute as to the price. Obviously the question of the telephone conversations was very important, as it was a substantial part of the corroboration of Kirk's story, apart from the white receipts which were in agreement with the appellant's story.

When that point was raised on the second day, a question arose in the course of the discussion what actually had been said. Undoubtedly it is a very unfortunate circumstance that no note had been taken by the Recorder or by counsel, dealing with that particular part of the cross-examination of Kirk. Counsel who is cross-examining cannot take such a note, and at the time his junior was not in court. A judge has to take a note, but nothing is more difficult than to take an accurate record of the cross-examination. Often it turns out that an answer which at the time seemed unimportant is most material. It is clear that Mr. Marshall Hall did ask Kirk whether he had not telephoned to Whiteley's from

the appellant's office, and the answer was, "Only in the first case." Evidently the jury thought a good deal of the point, for they said that they wanted to know whether Durrant had spoken to the appellant. This shews that they were under a misapprehension as to what had taken place. There was a discussion as to the evidence given on the point; the shorthand writer who had taken a note on the first day was absent, and the Recorder read his note of the examination in chief. The case then proceeded, when it was suggested that Kirk should be re-called and that the question should be put to him. He was re-called, and in substance answered that there had been no ringing-up of Whiteley's on the first occasion. If a full note of the cross-examination had been taken it would have been seen that Mr. Marshall Hall was perfectly right in his recollection of the answer first given by Kirk to him, but the case proceeded on that last answer of Kirk. Considerable importance was attached to that answer, and if the same answer had been given as in cross-examination, or if it had been recalled that the last answer had differed from the first, it must have had a great influence on the jury. Moreover Kirk was an accomplice, and the Recorder told the jury that corroboration of his evidence was necessary; if the jury had known that Kirk had contradicted himself in this important particular at a critical moment in the case, they would not have been likely to believe him against the appellant. That last answer of Kirk was treated as an important matter in the summing up of the Recorder, which was by no means unfavourable to the acquittal of the appellant. We are satisfied that there was a mistake, and a mistake on a matter of importance, and the right course therefore is to quash the conviction.

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Conviction quashed.

Solicitors for the Appellant—*Harry Wilson & Co.*

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When there is no misjoinder of counts in law, the question of putting the prosecution to election is within the discretion of the judge, who must be satisfied that the defence is not embarrassed by the joinder.

Though a verdict of both stealing and receiving may be technically wrong against the whole number of defendants, yet if some are guilty of either (and sentence is not affected) the Court will not set aside the verdict.

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These were appeals against conviction on a point of law; in the case of Gutwirth and Silverman there were also applications for leave to appeal against sentence. Appellants were convicted of larceny out of a postal packet, at the Central Criminal Court, on the 24th November, 1913, before A. T. Lawrence J., Grizzard and Lockett were sentenced to seven years' penal servitude, Gutwirth to eighteen months' imprisonment with hard labour, and Silverman to five years' penal servitude. Gutwirth and Silverman were also recommended for expulsion.

Vachell, K. C. (with him *Curtis Bennett*), for appellant Lockett, who was present. By agreement among the appellants the Court is asked to hear Lockett's case first. The appeal is based on the form of the indictment and on misdirection, and the facts are shortly as follows: Max Meyer is a pearl and diamond merchant carrying on business at 88, Hatton Garden, and he has an agent in Paris named Salaman. From time to time Salaman sent registered packages from Paris to Meyer in London. The appellant Silverman occupied a little office at 101, Hatton Garden, and in May or June last he instructed an engraver to produce a seal with the initials M. M. which was undoubtedly a reproduction of a seal used by Salaman. On the 15th July a valuable pearl necklace, said to be worth £160,000, was despatched by Salaman to Meyer. It was packed in a box by Salaman, who sealed it with the seal bearing the initials M. M. in various places, took it to a post office in Paris, and registered it. After passing through the hands of various French and English postal officials it reached the E.C. district post office in London early in the morning of the 16th July. The official who received it there said that the box seemed then to be intact, and he had no reason to believe it had

been tampered with. He gave it out to a postman named Nevill to deliver it at Meyer's office. On that morning Nevill had packages exceeding the weight that one man is expected to carry, and therefore a bagman was told to assist him. The delivery began at 112, Hatton Garden, and then followed the descending numbers. Silverman had, shortly before this, made a requisition to the postal authorities that letters for him should be delivered at his own office, which was on the third floor, and not be left with the hall-porter. When the postmen came to 101, Hatton Garden, each had a bag; Nevill had the bag for the first half of the delivery which contained Silverman's letters; Holland, the bagman, had the bag with the box of pearls. Nevill and Holland were not called for the prosecution, but they were called for the defence, and said that Nevill took one letter, and nothing else, out of his bag and went up to Silverman's office, returning in a minute or a minute and a half. Although the Crown called the house-keeper at this building, he was not asked about any of the details of that morning, nor even whether Silverman was in the building when Nevill went up.

At 94, Hatton Garden, the first bag was exhausted and Holland took it back, leaving Nevill to go on alone with the second bag. At 88, Hatton Garden, Nevill delivered the box for Meyer to the commissionaire, who put it in a safe until a commissionaire in the service of Meyer arrived; he was given the package and locked it up in Meyer's office until the latter arrived about half an hour later. He then opened the box, when it was found that the pearls were missing, and that there was nothing in the box except a portion of a French newspaper and some pieces of French sugar.

The pearls were insured, and a description of them was circulated, and a reward of £10,000 offered for their recovery. This came to the knowledge of a man named Brandstatter at Antwerp, who met there Gutwirth, whom he had known for years; Gutwirth told him that he had got Meyer's pearls for sale. Brandstatter communicated with one Quadratstein, and on the 15th August they came to London where they met Gutwirth, Grizzard and Silverman, and discussed openly with them the question of the purchase of Meyer's pearls. The next day some of the appellants were at a restaurant with Brandstatter and Quadratstein, when Lockett came in and sat near them. One appellant asked Lockett for a match, and Lockett threw over to

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him a match-box containing two or three of the missing pearls. Various meetings followed, and on the 25th August there was a meeting at the First Avenue Hotel when the necklace was produced, and three of the pearls were sold to a man named Spanier, who was assisting the other two men, for 100,000 francs, which was paid in French notes. There is no question that the pearls then produced were those lost by Meyer. Further meetings took place to arrange for the purchase of the rest of the pearls, and on the 2nd September the appellants were arrested. On all the appellants were found French bank-notes which were identified as proceeds of the sale of the three pearls. At Silverman's office a ladle was found such as could be used for melting wax.

The indictment contained six counts; the first two charged the appellants under 8 Edw. 7, c. 48, the Post Office Act, 1908, with larceny of a postal packet, the property of the Postmaster-General, in course of transmission by post, and with feloniously receiving it; the third and fourth under 24 & 25 Vict. c. 96, the Larceny Act, 1861, with similar offences, the property being laid in Max Meyer; the fifth and sixth under 59 & 60 Vict. c. 52, the Larceny Act, 1896, with receiving goods in this country which to their knowledge had been stolen outside the United Kingdom, and with being unlawfully in the possession of goods so stolen. My submission is that this was misjoinder of an embarrassing character which entitles the appellants to have the indictment quashed. The last two counts relate to a charge which is quite separate from the other four, and which was not an offence at all before 1896; the maximum sentence under these counts is seven years' penal servitude, whereas under the first two counts it is penal servitude for life. It is true that s. 1 (4) of the Larceny Act, 1896, enacts that it is to be construed as part of the Larceny Act, 1861, but this is common form in statutes. If it is suggested that the last two counts can be included with the third and fourth by virtue of s. 92 of the Larceny Act, 1861, which makes it lawful to add counts for receiving to an indictment for larceny, this would not apply to the counts under ss. 50 and 52 of the Post Office Act, 1908. Those sections create new statutory offences with new statutory penalties, though no doubt it was an offence before to steal a postal packet in course of transmission by post.

It is not necessary for the defence to shew how the appellants were embarrassed; it is sufficient if they are likely to be

embarrassed. The general principle is shewn in *Heywood*, L. & C. 451; 9 Cox C. C. 479; 33 L. J. M. C. 133 (1864); see also *Elliott*, 1 Cr. App. R. 15 (1908). In the present case the objection was taken before plea, and after plea the judge was asked to put the prosecution to election. The judge said that the embarrassment to be guarded against was that which would affect an innocent man; here an innocent man would have been seriously hampered in having to meet at the same time charges of crimes in England and France.

The case for the prosecution was that the theft was committed while the parcel was in the English post, and the judge ought to have held, as was submitted, that there was no evidence to go to the jury on the last four counts. The jury found the appellants guilty on the first two counts only, but counsel in their speeches had to deal with the question where the theft was committed, and the appellants were prejudiced by this.

Further, the judge misdirected the jury on various points. He suggested that Nevill, the postman, was just the sort of man who might be got hold of by clever criminals and induced to leave the bag in the passage for a few minutes. There was no evidence at all to support this suggestion. He also suggested that the postmen had been bribed; there was only one piece of evidence as to bribery, and that was only evidence against Gutwirth. The judge ought to have pointed out to the jury that it was not evidence against the other three prisoners.

G. W. H. Jones for appellant Grizzard, who was present. I adopt Mr. Vachell's arguments. As to misjoinder, the real test as to whether the felonies are the same or not, is to see whether the facts which prove one also prove the other. Here proof of an offence under the Post Office Act disproved the other offences. S. 92 of the Larceny Act, 1861, does not make the joinder right, for it only justifies the joining of a count charging receiving to the count which charges the theft. Beyond this, it does not justify the joining of two or more different or inconsistent offences. In meeting a charge of felonious receiving it can be shewn that there was no theft; such a defence must be embarrassed by this indictment owing to the necessity of meeting two different and inconsistent sets of facts.

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Donald Corrie (with him *Valetta*), for appellant *Silverman*, who was present. As to conviction I adopt the arguments already put forward. I withdraw the application for leave to appeal against the recommendation for expulsion.

W. Frampton for appellant *Gutwirth*, who was present. I also do not wish to argue as to the sentence, which is a matter for the discretion of the Home Secretary.

R. D. Muir (with him *Travers Humphreys*), for the Crown, was called on as to misjoinder only. There is in law no objection to the joinder of various felonies in different counts of the same indictment, but the judge in his discretion may put the prosecution to election. There is no appeal from the exercise of this discretion, *Curtis* (above, p. 9). In *Mitchel*, 6 St. Tr. (N. S.) 599 (1848), on an indictment containing counts for feloniously compassing to depose the Queen, and also counts for feloniously compassing to levy war against the Queen, to force her to change her measures and counsels, the Court refused to put the Crown to its election, the two charges not being repugnant or likely to embarrass the prisoner in his defence, and *Lefroy B.* in that case quoting the judgment of *Patteson J.* in *Blackson*, 8 Car. & P. 43 (1837); and also citing *Young*, 3 T. R. 98; 1 Leach C. C. 505; 2 East P. C. 833 (1789), said: "Then to apply the rule laid down in that case to the present; here is no repugnancy in the different offences charged, they constitute but one *corpus delicti*, laid different ways." *Moore J.* in the same case said: "All the overt acts which go to support the one or the other felony charged in the indictment are the same, and form one *corpus delicti*. I cannot look on it as charging distinct felonies, but as attributing a different nature to the same felony." He cited *O'Connell*, 5 St. Tr. (N. S.) 783; 11 Cl. & F. 240; 9 Jur. 25; 1 Cox, C. C. 413 (1844).

In *Strange*, 8 Car. & P. 172 (1837), the offences of stabbing and cutting with intent to murder, and with intent to maim and disable, and with intent to do grievous bodily harm, were held to have been rightly included in one indictment, and the prosecutor was not put to election. Lord Denman C. J. said: "These are all felonies in their nature and of course may be joined in the same indictment. The jury must say to which count the evidence

applies." The principle is laid down in Russell on Crimes, 7th ed., vol. 2, p. 1952, in the following words: "Where it is uncertain whether the facts of the transaction will in law constitute one variety of crime or another, it is usual to insert in the indictment counts specifying in terms of art all the alternative offences of which it is likely that the facts of the transaction may justify conviction, where such offences can be lawfully joined in the same indictment"; and on p. 1953, "Where several distinct felonies are charged in the same indictment, the indictment is not thereby rendered bad; but the judge may call on the prosecution to elect upon which felony the trial shall proceed, and may thereafter exclude all evidence as to acts tending to prove any felony which is not part of the same transaction or admissible under some other rule of evidence."

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[THE LORD CHIEF JUSTICE: We need not trouble you further on that point. But can the verdict be justified, by which, on the first two counts, all four appellants were found guilty of both stealing and receiving?]

The verdict can only be justified by taking these two counts as one indictment; where an indictment charges in different counts, larceny and receiving, a general verdict may be returned.

Vachell, K. C.: In all the cases cited the ground for decision was that the facts in each charge were the same although the charge varied. Here the facts are different.

THE LORD CHIEF JUSTICE: This is an appeal by four persons, who were convicted on an indictment which charged them with stealing and receiving a pearl necklace and three loose pearls. They were found guilty on two of the six counts of the indictment, and the two counts on which they were found guilty were framed under the Post Office Act, 1908, that as to stealing under s. 50, and that as to receiving under s. 52. The maximum punishment for offences of that character, either stealing or receiving, is penal servitude for life. It is for the Court to determine whether the offence was proved against the appellants, whether a proper direction was given to the jury by the judge, and whether the indictment was good in law and ought to have been put to the jury in the form

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in which it was put by the judge. There were four other counts in the indictment; under the third, the appellants were charged with stealing, and under the fourth with receiving the property of Max Meyer, these counts being framed under the Larceny Act, 1861; and under them it was necessary to prove that the property had been stolen in this country. The fifth count was under the Larceny Act, 1896, s. 1, which makes it an offence to receive goods stolen outside the United Kingdom the taking of which would have constituted larceny if it had happened in the United Kingdom; and the sixth count, under the same statute, charged them with being in unlawful possession in this country of goods stolen outside the United Kingdom. In both the fifth and sixth counts it was part of the necessary averment that the appellants knew that the property had been stolen.

It is unnecessary to recapitulate the facts; they have been stated shortly and clearly by Mr. Vachell. It is sufficient to say that at some time in the course of transmission from Paris to Max Meyer in London the pearls and the necklace were stolen. The necklace was very valuable, being estimated at £160,000, and the pearls were also of considerable value. The exact moment at which the theft took place was not made clear, and it is unnecessary that it should be precisely defined. The facts proved at the trial disclosed as plainly as possible that the offence was in fact committed by the four prisoners. It would be waste of time to go through the evidence, for it was manifest that on the facts alone, apart from the question of law, no defence could be made. Mr. Vachell relies on the only points that can be urged, namely, arguments based on the legal aspect of the case, and upon the practice and procedure adopted as distinguished from the merits. That renders it obligatory on the Court to examine with care the legal propositions and arguments which have been put forward.

The first point taken by Mr. Vachell and relied upon by counsel for the various defendants, who adopted his argument throughout, was that this indictment is bad for misjoinder; and I think I am doing no injustice to the admirable and concise argument which he addressed to us upon this and other points, if I say that this was the most substantial and the main point upon which he based his contentions. It is said that the judge ought to have quashed the indictment upon motion made to him, as it was made, before plea, and that, if he did not

do that, he then ought to have put the prosecution to election upon which of the various counts they would proceed; and, further, that, even if he did not adopt that course, he ought to have ruled at the end of the case for the Crown that there was no evidence upon any of the counts other than the first and second. Then it is said, further, that, even if he did not take that view at the end of the case for the Crown, he ought to have directed the jury to that effect at the end of the evidence and before the case was summed up.

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The main proposition involved in these contentions is that there were in this case three distinct and separate felonies alleged in the counts. In substance it amounts to this, that there were in the journey three sections in the course of which the larceny of these pearls may have been committed; either in France, or while in transmission by post in England, or after delivery by the postal officials in England. In the first case the offence of stealing would not be committed in this country, although under the Larceny Act, 1896, the offence of receiving or of being in unlawful possession of the pearls, knowing that they were stolen, could still be committed.

Now, apart altogether from the Larceny Act, 1861, and the Larceny Act, 1896, and simply from the point of view of common law practice and procedure, it is said that these offences could not be charged together in one indictment. No doubt, as a matter of practice and procedure, subject to certain exceptions upon which I shall have something to say later, the practice is well-known and well established that if there are more offences than one charged in an indictment for felony, the judge can, if he thinks right, call upon the prosecution to elect upon which count they intend to proceed. But it is said in this case that he is bound in law to do so. We must consider the various authorities, and see what principle is to be deduced from them.

Now, to take first the case of *Young*, the passage, referred to in *Mitchel* and in *Heywood*, from the judgment of Buller J. which is important is as follows:—"In misdemeanours the case in Burrow [984: *Benfield and Saunders*, 1760] shews that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases it is no objection at this stage of the prosecution (writ of error). On the face of an indictment every count imports

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to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are, or are not, distinct. But, if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury: for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner do not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed." In substance this means that, if the judge thinks that the prisoner will be embarrassed by being put upon his trial on an indictment in which there are several counts for distinct felonies, the judge, in order to safeguard the prisoner's interests, should either quash the indictment, if he thinks right, or should make the prosecution elect upon which of the counts they will proceed. That is the foundation of the notion which exists and has been urged at various times, that the judge is bound in law either to quash the indictment or to put the prosecution to election. By reference to *Mitchel*, which is earlier in date than *Heywood* and contains a careful review of precedents, and to *Heywood*, which was relied upon in the main by Mr. Vachell, in which all the authorities are so carefully collected and considered that it is unnecessary for us to go through them *seriatim*, it becomes clear that the rule is not one of law, but is a matter of discretion for the judge. Parke B., after very careful consideration, agrees with this view and puts it in the case [*Blackson*] referred to in *Mitchel*, "The reason why counts ought not to be joined in an indictment against a prisoner for stealing and also for receiving is, because they are in fact totally distinct offences, and a prisoner cannot be found guilty of both." It must be borne in mind that he is dealing there with the law as it existed before the Act of 1861 was passed permitting the joinder of counts in the same indictment for stealing and receiving. "But in cases where two charges are not repugnant they may be properly joined, as in an indictment for forgery, where one count is inserted for the forging, and another for the uttering the forged instrument. In such a case the prisoner might be convicted of both charges, and

here also a conviction on both counts might take place; the two facts charged form part of one transaction, and cannot possibly embarrass or confuse the prisoner in making his defence; the prosecutor therefore cannot be put to his election, and the trial must go on." It is apparent, on examination of the authorities, that this rule is one of practice and procedure devised by the judges who have presided in the past at criminal trials, for the purpose of protecting prisoners from embarrassment and oppression, and that these opinions expressed by the judges are not laid down as rules of law, and are not rules of law, but are guides to the course which the presiding judge should, in his wisdom and discretion, adopt at the trial.

Then it is said that in such a case, although it may be a matter of discretion, the judge must exercise his discretion judicially, and in this case, if he refused to quash the indictment, he should have put the prosecution to election. That involves consideration of the overt acts relied upon by the prosecution. In our view that is the material element to which the judge's attention should be directed in determining what course he should adopt. He must consider whether the prisoner will be embarrassed in his defence, and in determining that he must examine whether the overt acts relied upon in support of the offences charged in the counts of the indictment are in substance the same for each offence. Now, once we have arrived at that conclusion it becomes apparent that if in substance the facts are the same, the overt acts relied upon are the same, and if so, then there is no repugnance in these counts, and the consequence would be that they might be charged together in one indictment, and there would be no ground upon which we could say that the judge should have put the prosecution to election. In this connection it is right that we should note the argument of Mr. Vachell that the overt acts are not the same, and in support of it he says, "You have here to consider that the offence may have been committed in France, which is not the same as saying that it was committed in England, and it may have been committed in transmission in the post; nobody knows where it was committed." That may be true, and no doubt it is true in a great many cases, that you may not be able to locate the exact spot at which the particular offence charged was committed; you may not be able to prove the exact point of time at which it was

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committed, but what the Court has to consider is whether in substance the acts charged are the same. Here there was a theft of these pearls at some point in what I may describe as the one transaction of the sending of the pearls by Mr. Salaman in Paris to Max Meyer in London. We think the judge was quite right in the view he took, and that in these circumstances there was nothing which made it incumbent upon him to exercise his discretion in the way suggested; therefore these points fail.

It is further contended that the judge ought to have directed the jury that there was no evidence on the last four counts. That involves the consideration of the summing up, and of the criticisms made upon it. They may be put quite shortly; as I understand, there are two points made. One was that the judge ought to have ruled that there was no evidence on the last four counts, and the other put forward by Mr. Jones, and not substantially different from the first, that although there was evidence upon the first two counts, yet it was wrong to submit to the jury the evidence given with regard to the other four, notwithstanding that the jury only convicted on the first two counts and acquitted on the other four. It was said that the defence was embarrassed because the jury had all the facts put together on the six counts; they may have thought that, once the pearls were stolen, they could quite properly come to a conclusion that they were stolen whilst in transit of post, and could, therefore, convict under the statute of 1908, which is the one which gives the right to impose the heaviest sentence; and that it was never clearly brought home to their minds that they must find where the pearls were stolen, and not merely that they were in fact stolen. Once the summing up is looked at it seems to us that it is not open to the appellants to make out any grievance with regard to this. At the end of the summing up the judge, having dealt with the facts, puts it perfectly plainly to the jury, and in a way which leaves it beyond any doubt. He says: "You must ask yourselves whether those prisoners are not guilty of being the persons who arranged to steal and stole those pearls. Secondly, if you have any doubt about it, you must ask yourselves whether they are not the persons who received them, knowing them to have been stolen; and, finally, you must ask yourselves whether they were not so received, having been stolen while in transit in the English post. Of course you have the other possibilities before you, but the

prosecution do not ask you to find that they were either stolen in France or that they were stolen from Mr. Meyer, and I myself do not see any ground for suggesting to you that that is the inference which sensible men should draw. It seems to me that if you want to look at this case boldly and fairly, you would come to the conclusion that these pearls were stolen while in transit through the English post." The jury had the various theories before them, and they came to the conclusion that the offences were proved under the first and second counts. We think there was a right direction, and that no complaint can be made with reference to it.

There was a further grievance made with reference to the summing up, the complaint being that the judge put the suggestion of the prosecution how the theft happened. It was argued that although the Crown may do that through their counsel, the judge ought not to have taken that course. It is enough to say that it was very proper for the judge to point out to the jury: "Certain facts are proved; it is open to you if you come to that conclusion to draw certain inferences of fact which it is suggested by the Crown you should draw." The complaint in the main was that the judge had suggested that the postmen were bribed, and that the theft was committed by that means. There was the evidence of Quadratstein and Brandstatter with regard to the postmen, and if the jury accepted it there was undoubtedly evidence of statements made by one or other of the appellants that the postmen had been bribed. Upon that point, therefore, we see no ground of complaint.

Upon the whole, and taking into account all the points raised, we think that, on the facts, it was quite impossible to come to any other conclusion, and upon the various aspects of the law to which our attention has been directed, there is no ground of complaint open to the appellants.

I may add that in our view it is not possible to convict these four defendants both of stealing and of receiving. It was, of course, open to the jury to find that one or other of the prisoners had stolen the pearls, and that one or other had received them, but they have found a verdict against the four prisoners on the two counts. It has no practical value in this case, because we are dealing with exactly the same facts with regard to which, on any finding, whether one prisoner is regarded as guilty on the

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first count, and another as guilty on the second, both would certainly receive the same sentence. No doubt Mr. Muir is right in saying that in substance what was intended was to find them guilty on the indictment. In form—I only call attention to it so that it may not be thought that the point has been overlooked—the conviction of all the four prisoners on the two counts is not right, but for the reasons which we have already given that has no value, and does not affect the sentences which have been pronounced upon these prisoners.

Therefore the conclusion to which we have come is that this appeal must be dismissed. As no leave to appeal was given the sentences will run from the present date.

Appeal dismissed.

Solicitors for appellants Grizzard and Lockett:—*Lewis Margetts & Jenkins.*

Solicitors for appellants Gutwirth and Silverman:—*Osborn & Osborn.*

A. L. B. T.

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